

(26,156)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 689.

S. D. BARRETT, PETITIONER,

vs.

THE VIRGINIAN RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

	Page
Transcript of record from the district court of the United States for the Western district of Virginia.....	1
Stipulation of counsel as to contents of record.....	1
Stipulation of counsel as to printing of record.....	2
Declaration	2
Order impaneling jury, etc.....	5
Order containing judgment, etc.....	6
Opinion	7
Bill of exceptions No. 1 containing the following evidence:	
For plaintiff:	
Testimony of S. D. Barrett.....	8
W. E. Whitt.....	18
Robert Tiller	19
Chester Cook	20
Dr. E. T. Brady.....	22
Dr. E. P. Tompkins.....	23
F. N. Hayes.....	24

	Original. Print
Defendant's evidence:	
Testimony of R. McIntosh	26
T. J. Bondurant.....	28
C. M. Fleshman.....	30
J. R. Pettitt.....	32
A. G. Houston.....	33
Motion for directing verdict.....	36
Order of February 26, 1917, directing verdict.....	36
Judge's certificate	37
Bill of exception No. 2.....	37
Bill of exception No. 3.....	38
Assignment of errors.....	38
Memorandum required by rule 14, section 7.....	39
Clerk's certificate	40
Proceedings in the United States Circuit Court of Appeals.....	41
Original papers certified up under sec. 7, rule 14.....	41
Appearance for plaintiff in error.....	41
Appearance for defendant in error.....	41
Original exhibits (2 photographs) certified up (not set out).....	41
Stipulation as to briefs.....	41
Appearance for defendant in error.....	42
Argument of cause.....	42
Opinion, Pritchard, J.....	43
Judgment	49
Order staying mandate.....	49
Clerk's certificate	50
Writ of certiorari and return.....	51

**STIPULATION OF COUNSEL AS TO CONTENTS OF
RECORD.**

(1) Filed March 23, 1917.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF
VIRGINIA.

S. D. Barrett, Plaintiff,

v.

The Virginian Railway Company, a Corporation, De-
fendant.

To The Virginian Railway Company:

Take notice that we will apply forthwith to the Clerk
of the United States District Court, Western District of
Virginia, for a transcript of the record in the above en-
titled case, to be certified to the United States Circuit
Court of Appeals, Fourth Circuit.

WELBORN AND JAMISON,
and S. H. HOGE, Plaintiff's Attorneys.
By W. L. WELBORN,

I hereby acknowledge receipt of the above notice.
Given under my hand this 21st day of March, 1917.

H. T. HALL,
Defendant's Attorney.

MEMO. It is hereby agreed that the clerk shall in-
clude in the transcript of the record the following papers
and proceedings:

The declaration.

Defendant's plea of "Not Guilty."

Plaintiff's Bills of Exception Numbers 1, 2 and 3.

The orders of the court.

The petition for a writ of error.

The assignment of errors.

Bond.

Citation.

Clerk's certificate.

- (2) WELBORN AND JAMISON,
 and S. H. HOGE, Plaintiff's Attorneys.
 By W. L. WELBORN,
 H. T. HALL,
 Defendant's Attorney.

STIPULATION OF COUNSEL AS TO PRINTING RECORD.

- (3) Filed March 26, 1917.

S. D. Barrett, Plaintiff in Error,

versus

The Virginian Railway Company, a Corporation, Defendant in Error.

It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled cause, transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va., and be printed, in accordance with Rule 23 of that court.

 WELBORN & JAMISON,
 J. G. CHALLICE,
 Counsel for Plaintiff in Error.
 H. T. HALL,
 Counsel for Defendant in Error.

March 26, 1917.

DECLARATION.

- (4) Filed April 5, 1916.

S. D. Barrett, a citizen and inhabitant of the United States and of the State of Virginia, and residing in Roanoke, Virginia, complains of the Virginian Railway Company, a corporation organized and doing business under the laws of Virginia, and residing and having its principal office and place of business in the City of Norfolk, Virginia, of a plea of trespass on the case, for this, to-wit:

That heretofore, to-wit, on July 27, 1915, and for a

long time prior thereto, the defendant was and continued to be a common carrier by railroad, engaged in commerce between the States of Virginia and West Virginia and other states; and was the owner and operator of a certain steam railroad, running in and through said states, and had under its control a number of officers, agents and employes, and had a number of locomotives, tenders, cars and trains, propelled by steam, which locomotives, tenders, cars and trains, operated by the defendant and its said officers, agents and employes, were engaged in both freight and passenger transportation, in the commerce aforesaid, over said railroad, and were then and there the instruments of said commerce.

That at the time and place aforesaid the plaintiff was and had been for a long time, to-wit, 14 months, in the employment of the defendant as a machinist and engaged in interstate commerce; that it was his duty, among other things, to perform such mechanical services on the defendant's engines, tenders, cars and machinery at and near Elmore, West Virginia, as he was instructed and required to do by the defendant, its officers, agents (5) and employes; and that, in the performance of his said duties, he was under the direction and control of the defendant, its officers, agents and employes, and was required to work and did work upon locomotive engines and their appurtenances that were engaged in interstate commerce.

That on said day, to-wit, July 27, 1915, the plaintiff was instructed and required to perform certain services on one of the defendant's engines, to-wit, engine number 600, which was a compound engine used in pusher service, at or near Elmore, West Virginia, to-wit, to open and clean out the sand pipe on the right side of the from engine of said locomotive, which sand pipe had gotten clogged up, so that it would not perform its usual function.

That said engine, to-wit, engine number 600, at the time aforesaid, had been called to assist an eastbound interstate train, to-wit, train number —, from Elmore up Clark's Gap grade; was standing on one of the defendant's tracks at Elmore, to-wit, on what is known as the "Ready Track," headed eastward; and was being prepared to assist said train, as aforesaid.

Whereupon, it became and was the duty of the defendant, its officers, agents and employes, to use ordinary

care to provide for the plaintiff a reasonably safe place in which to work.

Yet the defendant, its officers, agents and employes did not regard their said duty, but carelessly and negligently failed in the same in this, to-wit, that at the time and place aforesaid, while the plaintiff was engaged in the performance of the services aforesaid on said engine, to-wit, engine number 600, there was a defect in a certain step on said engine provided for the use and convenience of the defendant's employes, to-wit, a step used in going from the running board on the right side of the engine to the front of the engine, in this, to-wit, that the angle iron supporting said step underneath and forming a part thereof was broken and caused the step to slant (6) downward toward the front of the engine.

Plaintiff further alleges that said defect was unknown to him and that, at the time and place aforesaid, while he was engaged in the performance of the services aforesaid, as he was instructed and required to do, as aforesaid, he had finished his work on the top section of said sand pipe and was going from the place on the running board which he had occupied in doing said work to the place on the ground beside the engine where he could work on the bottom section of said sand pipe; that he proceeded along the running board and over the by-pass valve and stepped upon the step aforesaid; and that, thereupon, as a direct result of the slanting position of said step, due to the defect aforesaid, the plaintiff's right foot slipped off of said step and his left leg struck the upper edge of the step between the knee and the ankle, and the bone in said leg was broken and said leg was otherwise bruised, cut and injured.

Plaintiff further alleges that said injuries caused him great physical pain and mental anguish for a long time, to-wit, — days; that during all of said time and for a long time thereafter, to-wit, — days, he was unable to work; that he had been making regularly \$3.64½ on week days and \$5.46¾ on Sundays; that he was denied employment by the defendant for a long time, to-wit, for thirty days or more, unless he would release the defendant from all claims for damages for said injuries and for loss of time and for surgical and medical expenses incurred by him in being cured of said injuries, in consideration of the nominal sum of \$1.00; that he was obliged to spend and did spend a large sum of money, to-wit,

— dollars, for surgical and medical services in being cured of said injuries; that he is thirty-nine years of age; and that said injuries are permanent and impair his ability to earn a livelihood.

(7) Plaintiff further alleges that he exercised ordinary care in the performance of his said duties at the time and place aforesaid.

Plaintiff further alleges that said failure of the defendant, its officers, agents and employes to perform their duty, as aforesaid, was the sole, direct and proximate cause of the plaintiff's injuries.

Whereupon, the plaintiff alleges that, by reason of the premises, he has sustained damages in the sum of \$10,000.00; and, by virtue of the Act of Congress, approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railway to their Employees in Certain Cases," and acts amendatory thereof, a cause of action has accrued to the plaintiff against the defendant; and therefore he brings this suit.

S. D. BARRETT,
By Counsel.

WELBORN AND JAMISON, and
JOHN G. CHALLICE, p. q.

ORDER OF COURT IMPANELING JURY, ETC.

(8) At a regular term of the United States District Court, Western District of Virginia, at Roanoke, Virginia, continued and held on February 24th, 1917.

S. D. Barrett

vs.

The Virginian Ry. Co.

This day came the parties, by their attorneys, and the defendant entered his plea of not guilty; to which the plaintiff replied generally, and thereupon came the following jury:

- | | |
|---------------------|-----------------------|
| 1. F. H. Givens, | 7. J. L. Morris, |
| 2. B. F. Mocmaw, | 8. W. H. Fenton, |
| 3. Joel L. Webster, | 9. A. M. Tatum, |
| 4. J. C. Moir, | 10. J. W. Funkhouser, |
| 5. J. H. Bradley, | 11. Jos. Glover, |
| 6. H. B. Sanborn, | 12. Louis Catogni, |

who were duly elected, tried and sworn according to law and the reception of evidence was entered upon, and the same having been concluded, the defendant moved the court to direct a verdict in favor of the defendant, and the hour of adjournment having arrived, it is ordered that this court stand adjourned until 9:30 Monday morning.

ORDER GIVING JUDGMENT, ETC.

(9) At a regular term of the United States District Court, Western District of Virginia, at Roanoke, Virginia, continued and held on February 26th, 1917.

S. D. Barrett

vs.

Virginian Ry. Co.

This day came again the parties, by their attorneys, and came also the same jury as on Saturday. And the court having considered the motion made by the defendant, on Saturday to direct a verdict for the defendant, and being of opinion, for reasons set out in writing and this day filed, that said motion should be granted, did read the said opinion to said counsel and announce that the would direct a verdict for the defendant. And thereupon the plaintiff, by counsel, moved the court to be permitted to take a voluntary non-suit; which motion was opposed by counsel for defendant. And as the court is of opinion that the motion comes too late, it is overruled; and to this action of the court the plaintiff, by counsel, excepted. And thereupon the court directed the jury to find a verdict for the defendant; and to this action of the court the plaintiff, by counsel, excepted. And thereupon the jury rendered and returned the following verdict: "We, the jury, by direction of the court, find for the defendant. B. F. Moomaw, Sr., foreman." And thereupon the plaintiff, by counsel, moved the court to set aside said verdict, and grant plaintiff a new trial; and this motion the court, after consideration, overruled. And to this action of the court the plaintiff excepted. It is therefore considered by the court that the plaintiff take nothing by his bill, but for his false clamor be in mercy; that the defendant go hence without day, and recover of the plaintiff its costs in this

behalf expended. And the plaintiff, by counsel, excepted, to the judgment of the court.

OPINION.

(9a)

Filed February 23, 1917.

**OPINION ON MOTION TO DIRECT VERDICT FOR THE
DEFENDANT.**

I assume the entire truth of the plaintiff's statement that his fall was caused by the fact that a step on the engine had been damaged so that the outside edge of the step was an inch and a half to two inches lower than the inside edge. It seems to be a perfectly well settled rule of law that the master is not responsible for the defective condition of machinery unless he either knew of its defective condition or in the exercise of ordinary care should have known of its condition in time to have prevented the injury to the plaintiff. There is in the evidence in this case nothing to show when the step became defective. It is a reasonable inference that it was the result of some heavy blow or strong pressure. The injury to the step may have existed for a long time and it may have occurred within possibly a few minutes before the time of the injury to the plaintiff. If I could from the nature of the injury say that it was impossible that the injury to the step could have occurred in the round-house a few minutes before the engine was placed on the "ready" track, there might be ground for leaving the question to the jury as to whether or not the master should have known of the condition of the step. However, the injury to the step is of such nature that it could have occurred in the round-house and could have occurred not many minutes before the time that the plaintiff slipped from it. A heavy blow from a reckless employee with a sledge hammer, say, or the falling on the step of some heavy object, or a collision, could account for the condition of the step and any one of these could have occurred so shortly before the accident that the master clearly would not be liable for the condition of the step. To submit the case to the jury therefore would seem to be simply an invitation to them to speculate as to whether or not the injury to the step occurred so long before the injury to the plaintiff that the master should have known of the condition of the step.

BILL OF EXCEPTION NO. 1.

(10)

Filed March 23, 1917.

Be it remembered that upon the trial of this case the plaintiff and defendant, to maintain the issue on their respective parts, introduced the following evidence:

(11) The Plaintiff, to sustain the issue on his part, introduced the following evidence in chief:

ADMISSION.

By agreement of counsel it is admitted that the Virginian Railway Company was at the time of the accident complained of engaged in Interstate Commerce, and that the plaintiff was at said time employed in Interstate Commerce.

(13) S. D. BARRETT, the Plaintiff, on direct examination by Mr. Welborn, said:

My name is S. D. Barrett. I am the plaintiff in this case and was employed in July, 1915, by the Virginian Railway Company at Elmore, Wyoming County, West Virginia, as a machinist. While so employed, I was injured on the 27th or 28th of July, 1915, to the best of my knowledge, while working on engine 600, which was on what we called the ready track; that is, the track that engines are set out on for crews to call for them. I was authorized by the foreman to go over there and clean out the sand pipe. On arrival I examined the sand pipe and found it stopped up with wet sand. I had some difficulty in getting the sand pipe open.

While going up on the engine the first time I climbed up over the running board; and the first time I came down I came down the same way. The sand pipe was connected just under the running board at one connection with the union and near the sand dome with another union. I had to disconnect both places and take the sand pipe off in order to get the wet sand out. After I had taken the sand pipe down and punched and gouged the wet sand out of it, I went up over the front of the engine and over the running board, and over that way from the pilot, and connected this sand pipe at the top. I was

S. D. BARRETT.

working hurriedly with this sand pipe as the crew was ready to go out and it was a matter of importance to the (14) company that they get their crews out on time, or at least they let on that way to us. So I was hurrying along, and the sand pipe was connected up here, and I aimed to come down over the pilot to connect the bottom part of the sand pipe. There being a step there slanting something like an inch and a half lower at the front than at the back I slipped on that step and fell. My right foot slipped off the step, causing my left leg to come down and hit across the step, fracturing the large bone in my leg, which I suffered seriously with. After I had gotten down off the engine, and was sitting on the ground, and had kinder recovered from my sickness, and kinder felt at myself, I wondered what had caused me to fall. I looked up at the step and found that the step was slanting something like as near as I could tell an inch and a half lower in the front than in the back. I was then taken over to the Round house, and taken into the wash room there. A doctor was brought down and he splintered by leg up and I was taken home. In the meantime I saw when I looked at the step that there was a crack in this angle iron coming around underneath that supports it from being springy; which step was made of a flat piece of boiler iron, perfectly smooth on top, something like three-sixteenths of an inch thick to the best of my knowledge. This angle iron was placed on there for the support of this step, to prevent it from springing, and this angle iron was broken also. It was my left leg which was broken.

(15) I stated that I was "authorized" by the foreman to go over and do this work, but we had standing orders to that effect. When the engineers reported these sand pipes in bad condition, I mean when their sand was stopped, they usually reported it to the foreman and we had standing orders that if they didn't find the foreman and they told a machinist we were to go over and do the work any way, because we had instructions to that effect.

In response to questions propounded by the court the witness says: there was only one crack in that angle bar at that time, which angle bar was underneath the steps. There was only one angle bar at this time. When I was able to hobble back up to the shop on a stick to examine that step more carefully I found that there were

two cracks in this angle bar at that time. Whether the step was broken from the bottom thereof to the top when I first looked at it I couldn't tell, because of course I couldn't climb up there at that time to examine it carefully. It did not wholly support the step. I measured the width of the step at one time but it has slipped my memory, though I think it is somewhere from ten to twelve inches wide and while I never measured its length I would say it is something like eighteen inches long.

In response to further questions propounded by his counsel the witness said: as to the width and thickness of the angle iron that was under the step to support it, if I mistake not though I don't know that I could exactly tell you, not having measured it, I would call that an inch and a half angle iron. Angle iron work doesn't come in (16) our line at all and I don't know much about it, but I know that it is used there often about strengthening anything so as not to make it bunglesome. It is made in a way that it is very strong and hard to bend. Yes, when I subsequently examined this angle iron I found two cracks in it though at the first time I examined it there was only one crack in it.

Q. What did the discovery of the second crack at the subsequent examination mean to you?

Defendant's Objection.—Defendant objected to the question because asking simply for the opinion or the conclusion of the witness which would be improper.

By the COURT: I do not think the witness may answer that question, but he may describe anything he saw and let the jury draw their inference therefrom.

Q. (By Mr. WELBORN) How large were those cracks?
A. That first crack that was in there had opened up wider at the bottom than at the top of the step of course. You could hardly discover that crack at the first, it was hard to detect. I was ten feet from there I suppose or something a little more than that. The second time I examined that step the crack had been opened up, showing that the step had been pushed up or knocked up some way or other, and had opened that crack up some. It was not as slanting then as it was when I first examined the step. The interval between the time when I slipped and the time thereafter when I examined it was something like 30 days.

S. D. BARRETT.

In addition to the bone being broken in my left leg I had a slight cut place on my leg and I suffered seriously (17) with that injury during something like three weeks, for three weeks or something of the kind. And I have suffered more or less all the time from it since, especially when I am walking on my leg a great deal or standing on it. It seems to be weak there and gives me pain. To a certain extent it interferes with my following my usual occupation, because it prevents me from climbing over engines to a certain extent. I cannot use that leg as I once used it.

Q. (By Mr. WELBORN) How long were you laid up from the time of the injury until you got out and reported for work, if you were able to go to work? A. Well, something like 35 days I expect. I do not know exactly the amount of days but I was not able to go to work at that time. The foreman had told me he was short of help, and if I would come in to work he would protect me in every way he possibly could.

Q. What do you mean by that?

Defendant's Objection.—Defendant objects to the question because immaterial and improper.

By the COURT: The only materiality of that inquiry that I can see would be that the witness was allowed thereby to go to work earlier than he otherwise would have been permitted to go to work. I think it proper that the jury should have that information.

Defendant Excepts.

A. Why, he meant he would not place me on any (18) heavy work, or expose me in any way whereby I would be liable to injure my leg over again. To the best of my knowledge that is what he meant.

Defendant's Motion to Exclude Question and Answer.—At the conclusion of the answer by the witness the defendant moved the court to exclude both the question and the answer from the jury.

Motion Overruled. Defendant Excepted.

Q. (By Mr. WELBORN) Mr. Barrett, were you permitted to resume work when you reported at that time?

Defendant's Objection.—Defendant objected to the question because immaterial.

Plaintiff, by counsel, says in reply to defendant's objection that he wished to show that although the foreman was willing to permit the witness to come back to work certain conditions were imposed precedent thereto; that is, that he would be required to sign a release of any and all claims against the company by reason of the accident for the payment of one-half of his time while off.

Objection Sustained. Plaintiff Excepted.

Q. (By Mr. WELBORN) Mr. Barrett, how much time did you lose on account of the injury you have just described, if any.

Defendant's Objection.—Defendant, objected to the question because already answered.

By the COURT.—I do not think the matter has been made clear and therefore I will overrule the objection.

A. I lost from the 27th or 28th of July up until the (19) 4th of October; that is, covering the time which I was held out of service and the time which I lost from the time I was injured. I mean between July and October of 1915.

During that period I would have earned \$261.61 I believe. To the best of my knowledge it is right about that amount. I spent some money in endeavoring to be cured of the injury. I have no record of it. I paid my own doctor's bill, in cash and not by check, something like \$20 or \$25. I am 40 years of age. The time when I fell I came off the engine in the way I should have come off. The time before that when I climbed over the side, was the way I should not have come off the engine. This engine was on the ready track where they stood engines and where the crews are called to for them.

Q. To what extent did your duties as machinist apply with reference to doing work on engines? A. At that point there they had no inspector and the machin-

S. D. BARRETT.

ists did their own inspecting, and they inspected the running gears and engines underneath, but didn't have anything to do with running boards or steps.

Defendant's Motion.—Defendant moves the court to strike out the last foregoing question and answer because the answer is not responsive to the question and because otherwise improper.

By the COURT.—The motion is overruled, the court being of opinion that the charge made in the declaration to the effect that the defendant was under the duty of furnishing a safe place, would, by necessary implication, include any duty necessary to perform the said work. For instance, it might not be within the knowledge of the plaintiff whether the defective condition of the step was due to some original defect or whether it had occurred shortly before the accident and was not discovered for want of proper inspection; and the plaintiff not being in a position to know, he was not under any duty to specifically charge which of the two subordinate duties was not performed.

Defendant Excepted.

Q. Mr. Barrett, take these two photographs and get down before the jury and explain the way in which you came down off that running board, and the step from which you fell, and also show them the position of the step as it appears in the photograph? **A.** Now, gentlemen of the jury, this is a front view of the engine, and this is the running board here. On that running board there is a step bolted on, which shows here on the photograph, and a little bit also over here. Here is what we call the by-pass valve on top of that valve. It is also used for a step. We come off this by-pass valve, onto this step here, and then from there down to that. This step here is the one I fell from. When I fell from it one of these cracks, and I couldn't tell which one, was in that little angle iron coming under there, which was the only support to that step to prevent it from being sprung. Since and about 30 days later I examined that step and found two cracks in there. This step at that time was an inch and a half low on this end. That was when I first noticed it there, after I fell off of it. When I next

S. D. BARRETT.

(21) noticed it the step was almost level, though not quite level, as it shows in this picture. This picture, as you will see, shows the step is not quite level. On this other picture it shows the side view of the engine, and shows the step much plainer, and shows a slight slant in it. Right here is where you come off the running board, and shows this step here, and the by-pass valve on out to this step here. It is quite a little distance from here to there, and this is a surface used to step on in coming off the engine. The other picture doesn't show as great a space in there as this one does. This step you see is level while this other one is not level. And at the time I fell off of it it was a great deal more slanting than it was when this picture was made.

Upon being examined by a juror the witness said: That crack was there the second time I saw it. The way I account for it is, I think to put a board or anything under that step it could have easily been prized up and thereby tended to open that crack up. The crack was wider at the bottom than at the top when I stepped on it. And when I looked at it the second time it was not closed up but was wider. The farther up you would prize it the wider you would open the crack in the angle iron, at the bottom, the crack being in the bottom. If you would press the step down it would incline to close the crack. If you would raise it up it would incline to open the crack. If that angle iron had been on top and you had pressed it down it would have opened it but it was underneath. This shows the two cracks here. It is underneath (22) the step, not over the top, not on the side.

On CROSS-EXAMINATION the witness said:

I had been working for the Virginian almost four years at the time the accident occurred though I do not know just the exact time. The accident occurred either on the 27th or 28th of July, 1915. A little better than two months after the accident occurred I went to work for the Norfolk & Western Railway at Roanoke. I do not know just how many days after the accident it was that I left Elmore, but something like two or three days that I went away with permission of my Doctor. My Doctor was Dr. Hunter, and I went to Athens, West Virginia. It might possibly have been the next day, but I think it was a couple of days later, some two or three days later.

S. D. BARRETT.

I stayed in Athens something like four weeks I think. I reported for work to the best of my knowledge on September 1st, but I was held out of service on the grounds that I refused to sign a release for half pay. I continued to report for something like two weeks to the best of my knowledge though I have no record of it. I said I thought I was entitled to full pay for all of the days I was held out of service, but I don't remember saying anything about making them pay me for it. Then I applied to the Norfolk & Western Railway for a job. I prepared and signed the paper showed me by counsel applying to the Norfolk & Western Railway Company for a job. The answer to the question contained therein, "Have you ever been injured, and if so, when and at what place?" (23) Is in my handwriting and is, "No". The following question, "How did it occur?" has a cross-mark after it, made by me. The next question "extent of injuries," has a cross-mark after it and was made by me. I made that statement in the paper to the Norfolk & Western from the simple fact that I was out of work and needed to go to work. If I had told the N. & W. people that I had been injured on the Virginian Railway they possibly wouldn't have given me a job. I consider that I done this in self-defense, for the protection of myself and family. And the N. & W. Railroad has never kicked to me about it since I made it. In fact, that is only a matter of form, which all railroads do not require to be filled out. As I said, all the chances were that they would not have given me a job had I told them. The answer to question ten, "If employed at present by whom?" is in my handwriting and is, "Virginian Railroad". I filled out this paper before I went to work, and I went to work on the 4th day of October. This is all in my handwriting; I admit it all. I gave four years references to the railroad when I was employed by the Norfolk & Western. As to representing that on the 28th of September, 1915, I was still in the employment of the Virginian Railroad I will say that I had never quit, and I haven't quit the Virginian Railroad yet. I expect I was gone from the Road a week before they ever knew I was gone. The Company taken me out of service before that time themselves on the ground that I wouldn't sign that release for half pay. I supposed I was carried on their books at that time. I didn't know (24) that I was or that I wasn't. While they refused to

S. D. BARRETT.

let me go to work I considered that taking a man out of service—well, they taken me out at that time for the simple reason that I wouldn't sign that release for half pay. I don't know that my stating that I was in the employ of the Virginian Railway Company improved my chances of getting a job with the Norfolk & Western. As a usual thing when a railroad needs a man they hire a machinist when he comes along. At that time work was a little slack, not as much in demand as at the present time, and they were not hiring as many men. I admit that it is always the case that you can get a job easier when you have a job. While the Virginian has never notified me that I could not work for it, yet neither had I told them that I wouldn't work for them. I have no recollection of being up on this engine but twice. This is the second trip down that I fell. The first time that I went up I climbed over the side of the engine and came down the same way. The second time I went up over the front, on the pilot, up over this same step. That is the step there that my right foot slipped off of, and my left leg was caught on. I couldn't say whether I stepped from the top of that steam chest there, the top of that by-pass valve, on to here and on to the step—it will show better on the other picture; here it is, on there, and here, and on the step but it is very probable that I did. I came off there on to this step; right off the running board and on to the by-pass valve. The step near which you put a cross-mark is the one that I say was slanting and (25) broken and had these cracks in it. I first noticed the crack after I fell off it; that is, after my foot slipped off and I fell. I was then just sitting just about the pilot of the engine, about 6 or 8 feet away from the engine on the ground. I looked up at that step and saw the crack in it and saw it was slanting. I don't know how high that step was from the ground but would say something near 6 feet, and I was about 6 or 8 feet away from the pilot when I saw it.

Mr. Cook was present when I fell and when I sat there and looked up and saw the slanting condition of that step and the crack in it. Mr. Tiller was present just a minute later, just after I fell; he was not present while I was there. And there were others; I believe Mr. Bondurant came over there about that time. I couldn't especially call any one else's name that I knew was there. I think there were other men present there though. I never did examine that step to see whether

S. D. BARRETT.

it would spring, and I don't know whether it was springy or not. I only went from the fact that the step was slanting. That was all that I could see that the step was slanting. When I went back and examined it a month later I found there were two cracks as the picture shows. These cracks had been opened up and they were wider than they were—or I mean that the one crack had been opened up some from what I noticed it when I first saw it. I can't point out on the photograph which one it was that had been opened up. I can't tell the jury which crack it was that I saw when sitting there on the ground. The cracks there are close together. And therefore I can't (26) tell which one I saw at first and which was the last one. I didn't take particular note of the crack and which way it ran. If I had I would have been able to have told, because they both kind a run together at the top. This railing around here is the hand-hold, and to protect the pilot of the engine to a certain extent. I suppose it is made of iron pipe and I don't know whether it is securely attached to the platform of the step. The picture shows that it is attached. When I went up the second time on the engine I went right over those steps, and suppose I stepped on this one, and on that one, I didn't see the cracks then. I never noticed the step being slanting at that time. I went up there hurriedly and didn't notice it. I didn't have time to notice to see whether the steps were slanting or not, I wish to say that the step was a flat piece of boiler steel, perfectly smooth on top, and it didn't have to be very slanting for a man's foot to slip off of it. It would be easy enough for a man going up there hurriedly not to notice its slanting condition even though it might be slanting enough for a man's foot to slip off of it.

On RE-EXAMINATION, the witness said:

In this application made to the Norfolk & Western Railway for a position, the question No. 7 reads: "Give record of your service for the last five years. Give each year in the regular order, down to date. State what railroad experience, if any, you have had; give names of roads, in what capacity employed, length of service on each road?" Now, in one of the lines under the name of (27) railroad or other employer it says, "Virginian"; and after town or city employed it says, "Princeton,

West Virginia," and the question, "What is your occupation?" the answer is, "Machinist" and under the date entered the service it says, "1911" and under the date left service, "1915".

As to liability to fall or ability to notice the slanting position of the step as between when going up and coming down I would say, that I don't know whether any one coming down would be any more apt to detect its being slanting but that it would be a great deal easier for him to slip off of it in coming down than when going up. but the chances are that he might protect himself easier when going up than when coming down.

(And Witness left the stand.)

W. E. WHITT, the second witness called and sworn on behalf of plaintiff, testified in chief as follows: My name is W. E. Whitt, and I live at Princeton, West Virginia. My occupation is that of photographer. I made some photographs of engine 600 of the Virginian Railway for Mr. Barrett. The photographs shown me are those that I made. I made them sometime last spring. I don't just remember the date but I would judge sometime in April. They are views of engine 600 of the Virginian Railway.

The said two photographs were thereupon introduced in evidence and marked for identification, "Plaintiff's Exhibit No. 1" and "Plaintiff's Exhibit No. 2".

On CROSS EXAMINATION, the witness said:

(28) I don't know that it was in April, 1916, that I made these photographs, but it was sometime in the spring and I would say in April or thereabouts, though I couldn't say for certain. Anyway it was in the spring of 1916.

(And witness left the stand.)

ROBERT TILLER, the third witness called, sworn on behalf of plaintiff, testified in chief as follows:

My name is Robert Tiller, and I was employed in July, 1915, at the time Mr. Barrett was injured, by the Virginian Railway at Elmore, West Virginia. I remember the occasion of his injury, and at that time my occupation was machinist helper. I was helping Mr. Barrett work on engine 600.

ROBERT TILLER.

About the time Mr. Barrett fell from the engine he was working on the sand pipe, and I disremember whether he was coming down or going up when he fell. I was working in the cab at the time he fell, and didn't see him fall, and when I stuck my head out of the cab window he was coming down—and I disremember whether any one was helping him or not, but when I stuck my head out of the window he was coming down off the pilot from where he had fallen from. Then I got down and went around to where he was at. Then he sat down in the shade of the car, and his legs seemed to be paining him very much, and I disremember how long he stayed there but they carried him over to the shop. And then they ordered a doctor, as well as I remember. I examined the step shown in photograph marked "Plaintiff's Exhibit No. 1" about 30 days after the accident, when Mr. Barrett came up and we went out together to examine it. At that time to the best of my (29) knowledge the step was from an inch to an inch and a half lower than it should have been. The lower part was to the right, the outer edge of the step.

On CROSS EXAMINATION, the witness said:

I was working as Mr. Barrett's helper. When I looked out of the window of the cab where I was working I saw him coming down off the pilot, where he had fallen from. I disremember whether any one was helping him or whether he was pulling down by himself. That was after he was hurt. I point out here on the photograph where he was as well as I remember. I disremember what he was on, but he was either standing or kneeling in there some place. I couldn't just exactly detect where he was from where I was. I didn't know at that time that he was hurt bad. I didn't know that he was hurt at all until after I got down off the engine and came around. He didn't sit down in the shade of the car until I came around. He was right about the pilot of the engine, where I showed you when I came down. I disremember whether he moved himself or whether he was helped. And I disremember whether any one helped him over in the shade of the car or whether he went over there himself. He was about 10 feet away from the engine. He didn't stay there but just a few minutes, sitting in the shade of the car. I didn't know whether he was hurt or not in coming down off of the engine, because

CHESTER COOK.

I was in the cab of the engine working and I didn't know he was hurt until I came around. They carried him into the round house and called a doctor. I worked there at Elmore for quite awhile after the accident and am still (30) working for the Virginian Railway. I didn't examine that step before 30 days had elapsed because it wasn't my job to examine it. I examined it at that time because Mr. Barrett came down and hobbled down there, and as well as I remember we went out to look at the step or at the condition of it. I didn't examine the step that day because it wasn't my place to do it. I was only supposed to do what I was told to do. I guess there were people who knew about the slanting step, but we never made any examination of that step, running boards and so forth. I disremember anybody saying anything about it. I don't know whether I would have remembered it or not if they had said anything about it. I knew he fell, but I didn't know he had fallen from a slanting step because I had never made any examination of the step. I don't know how long I worked with Mr. Barrett before he was hurt, but quite a bit. I don't know the exact number of months. I don't remember whether I practically commenced work as helper with him or not. No, I didn't commence work with him as helper; I helped Mr. Pettitt quite a bit before I helped Mr. Barrett. But during the time that Mr. Barrett was there to the best of my knowledge I helped him the most of the time. I don't remember how long I had worked with him before this accident.

(Witness left the stand.)

CHESTER COOK, the fourth witness called and sworn on behalf of the plaintiff testified in chief as follows:

(31) My name is Chester Cook and I was employed at Elmore, West Virginia, in 1915 by the Virginian Railway at the time Mr. Barrett was hurt. I was with him at the time he was hurt, and was working the oil rod cup job, I believe they call it, at the time. I was helping Mr. Barrett remedy the trouble with the sand pipe. What happened there was Mr. Barrett was working on the pipe trying to get the wet sand out of it. It was stopped up. He went up on the running board to see if he could not get it open up there, or disconnect it in someway, and he

CHESTER COOK.

was coming back down when he fell. I never saw him just at the time but I heard something crack, like it might be a little stick or something, and looked up and he was just pulling his leg up at that time.

Q. Take these photographs and show us the position Mr. Barrett was in when you heard the noise and looked? A. Now, just as I looked up he threw his leg up from behind this step and between the back of this step and the top of this cylinder head here, and caught it with his hands something like this (indicating by catching knee with both hands.)

Then Mr. Barrett got off the engine by himself and sat down. He was suffering a great deal, or seemed to be. Some of them helped him over to the shop and then he was taken home on an engine I believe. About a month or two after the accident, I don't know just how long afterwards, I made a kind of an examination of this step, and it was a little bit sloping to the front and rather to (32) the outer edge of the engine. I noticed a crack in the angle iron at that time. The crack looked to be something like a quarter of an inch opening. The outer edge of the step looked to be one or two inches lower than the back part but I couldn't just tell.

On CROSS EXAMINATION, the witness said:

When I saw him getting his leg up from behind that step it was between that and the trolley head I believe they call it. The top of this thing here, it comes up just behind the step (indicating on photograph). This is a steam pipe I guess here. It runs right close around that round place on the steam chest. He just about had his leg up when I first seen him he was coming up from behind the step with it; from the behind the steam chest or rather between the step and the steam chest or trolley head.

After looking at the photograph "Plaintiff's Exhibit No. 1" and "Plaintiff's Exhibit No. 2" the witness said: I guess that is the front edge of the step that you point out there. He pulled his leg up from right behind the step. This would be the front of the step, of course, and this would be the back. (Indicating on photograph.) I don't know whether where you put that cross-mark is the right place or not; it might be a little farther to the inside of the engine or to the outside of the engine, but

the cross-mark is in the neighborhood of where he was bringing his foot up from behind the step.

(Witness left the stand.)

(33) DR. E. T. BRADY, the fifth witness called and sworn on behalf of plaintiff, testified in chief as follows:

I am what is known as an X-Ray specialist, and have been doing nothing else for six years. I made some views of Mr. Barrett's leg on the 15th of May, 1916. I can show the jury the pictures I took, but it will only show where the fracture was, the fracture having healed at the time I took same.

DEFENDANT'S ADMISSION.

Defendant admits that plaintiff's leg was broken and suggests that the physician only be called upon to point out the location of the break as shown on his view.

The witness exhibited a glass plate to the jury and said: you can see these little arrows here indicating where the fracture had united. You are looking from the front backwards, and this other here is a side view of the same thing, showing a bulge in the bone at the point of healing. If you had this plate closer you could see it a great deal better. The place of fracture was below the knee here.

Plaintiff's Exhibit No. 3.—Thereupon the said X-Ray so identified by the witness and exhibited to the jury was introduced in evidence and marked "Plaintiff's Exhibit No. 3."

I should say that bone was broken entirely across, being the large bone of the lower leg, called the tibia. The worst consequences in a case of this kind would be non-healing, displacement of the fragments, producing deformity. Those are the most usual complications but are rather rare. I should say it would have no effect upon the use of the leg after it has healed.

Counsel for plaintiff showed the witness a medical book and asked the witness to read therefrom the place marked and see whether it made any difference in his answer: Thereupon the witness said: well I have read it.

DR. E. P. TOMPKINS.

It would simply depend upon whether you change your question or not. You asked me the usual complications and I told you the most frequent ones. This simply says soreness may arise, and so it may. I understood your question to mean permanent results. This refers to temporary results. Of course there is temporary soreness about every fracture temporary discomfort, and changes in the weather may produce aching and pains in the part but that wouldn't be considered a permanent disability; nor would it be considered usual, because a great many do not have it.

On CROSS EXAMINATION, the witness said:

This fracture had healed when I made my picture. There was no dislocation or any trouble of that kind at all; it was a perfect healing, a perfect union. While that may produce some temporary soreness and pain in wet weather I shouldn't think it would be permanent. When a fracture heals perfectly, as that one did, it is as good as ever.

(Witness left the stand.)

DR. E. P. TOMPKINS, the sixth witness called and sworn on behalf of plaintiff, testified in chief as follows:

I am a physician and surgeon, and have been practicing for 19 years. It has been my experience that fractures such as the breaking of the large bone in the leg frequently gives pain, resulting later on, some months say, and even perhaps some years after the injury has taken place. As to weather conditions, on a fracture of that kind, of course the symptoms produced are entirely subjective. That is, they are known only to the patient, and I can only state what patients have said to me, but it is a frequent occurrence in my experience that people who have undergone fracture will complain of pain and more or less disability in the use of the limb when the weather is damp, rainy or cold.

On CROSS EXAMINATION, the witness said:

I practiced for about 10 years in Rockbridge County, and have been in Roanoke nine years. I have treated quite a number of fractures, not perhaps as many as

F. N. HAYES.

some physicians and surgeons but a good many in the course of 19 years. In event of a fracture of a bone if the union is perfect it is as good and strong as ever. That is, if the adjustment of the two fragments is perfect, or nearly perfect, the function of the bone is the same as it was before. A person is likely to have pain, soreness and discomfort afterwards however. As to whether it will occur often or seldom depends upon where the break is, what bone, and upon the individual I think. In younger people it is less liable to occur than in the case of an adult or a person of middle age. The smaller bones would give less trouble than the larger ones. For instance, the break of a finger wouldn't give as much trouble as a break of the leg.

As to whether it is usual for people to suffer with (36) pains from a break where there is no dislocation and a perfect union depends upon what is meant by the word, "usual". Perhaps it doesn't occur in the majority of cases, but it does occur in a large percentage of cases; to the best of my knowledge and belief I would say from 20% to 30% of the cases.

(Witness left the stand.)

F. N. HAYES, the seventh witness called and sworn on behalf of plaintiff, testified in chief as follows:

My full name is Frank N. Hayes, occupation machinist, and employed now by the Virginian Railway. In July, 1915, I was employed by the Virginian Railway at Elmore, West Virginia. I remember the occasion when Mr. Barrett was hurt. I was on duty as night round house foreman at that point at that time. The accident occurred in the day time. I did not make an examination of the step on the front of engine 600. I came on duty as day foreman soon after Mr. Barrett was hurt, just a few days afterwards. I don't remember the exact number of days. After he thought he was able to work he reported for duty, but I did not allow him to go to work.

On CROSS EXAMINATION, the witness said:

I do not remember how long I had been night foreman, but not very long. Engine 600 was not run out of Elmore all the time. The engine was worked there as kinda extra pusher engine, and sometimes it was left at

F. N. HAYES.

Elmore, and sometimes it was worked out of Princeton. I came on as day foreman a few days after this injury. I never noticed anything wrong with that step. No repairs were made on that engine step while I was acting (37) either as night or day foreman that I know of. I would have known of repairs if I had directed them to be done at night. I never noticed these cracks in the step. I went up and down over that engine myself. I don't remember having noticed the step was slanting. I can't say that I would have noticed the step if it had been badly out of line, that is, slanting one to two inches in front. If the step had been reported as needing repairs I should think I would have examined it, I mean myself, but as it wasn't reported I didn't examine it.

ON RE-EXAMINATION, the witness said:

I told Mr. Hall that the step had not been repaired to my knowledge. There were other foremen who could have had it repaired without my knowledge.

ON RE-CROSS EXAMINATION, the witness said:

The other foreman there besides me was Mr. Bon-durant. I was on duty as night foreman at the time the injury occurred. I don't know that Mr. Barrett said anything about anything being wrong with this step.

Being further examined by counsel for plaintiff, the witness said:

Mr. Barrett was working in the day time and I was working at night. I wouldn't be likely to come in contact with him relative to work and so forth. I might pass him possibly between our homes, or on our way to work, or something of that kind but otherwise not.

(Witness left the stand.)

Plaintiff Rested in Chief.

(38) The Defendant, to sustain the issue joined on its part, introduced the following evidence:

R. J. MCINTOSH, the first witness called and sworn on behalf of defendant, testified in chief as follows:

I was employed by the Virginian Railway on the 28th day of July, 1915, when Mr. Barrett fell from an engine. On that day I was running the engine No. 600. When I was called for the engine and went out to get her ready, and before I started, I found that the sand pipes were stopped up with wet sand. I sent to the shop for a machinist to open the pipe, and they sent Mr. Barrett to work on it. He went up to the sand trap, and worked on it, and came back down and tried the sand, but it didn't work, and then he went back and worked at it again, and came back down and disconnected the pipe and brought the pipe down and beat the sand out of it, and then he went back and connected it up, and when he came down again he fell. It was on his third trip coming down that he fell. I was sitting right opposite the engine. On each one of these trips he went up over the pilot and up over the steam chest, and up over the running board to the sand trap on top. He went the same way each time; up over the steps in front of the engine. This photograph looks like a photograph of engine 600. I will point out on the photograph the way he went on these trips; there is a step here, and you get up on the step, and then over here, and there are also steps over here, and there is a step on the valve chamber, and a step on the running board, and a step up through to the sand (39) dome on top. He goes up this way and down over there. He went up that way each time he made the trip. I was looking at him when he fell. He fell from off the edge of this valve chamber is the way it looked to me. Where you marked there with your pencil is the right place. Looking at the side of the engine on this photograph we see the same valve chamber, with that round cap on the top. The first mark that was made on "Plaintiff's Exhibit No. 1" was indicated by an "X". The next mark made on "Plaintiff's Exhibit No. 2" is indicated by a "Y". They are located at the right points. He fell down between that valve chamber and the saddle there. He fell over that side. That place where he fell is back of this step here. He came over between this step; this is the step out here and over. He fell behind this step.

He slipped off the valve chamber back of the step. There was nothing wrong with the step that I found.

R. J. MCINTOSH.

I had occasion to see it that day afterwards, after the accident happened and I never saw anything wrong with it. I never made any close examination of it, however. Mr. Barrett was sitting on the edge of the ties when I took the engine away, and they sent for a doctor. I didn't speak to him after it happened. I have been familiar with that engine ever since it was put into service, or practically every since it has been with the Company. There has never been anything wrong with that step in front that we are talking about to my knowledge. In running that engine I had to pass up and down over those steps frequently. I did that frequently before this accident occurred. And I did it frequently afterwards; (40) I guess I have done that. We invariably have to go out from the cab during the course of a trip and open the sand while going up hill. I have went down and opened the front of the engine.

On CROSS EXAMINATION, the witness said:

I was sitting on the track just opposite where the engine was when Mr. Barrett was working on the sand pipe. I was sitting about opposite where the sand pipe is located. That is about 12 or 15 feet I guess from the front of the engine I was sitting over opposite this place and the sand pipe is right behind this cylinder.

Q. You said 12 feet from the front of the engine?
A. Here is what we call the front of the engine.

Q. You were sitting down on the ground. Wouldn't that cylinder head be between you and this step? A. No, sir.

Q. Isn't that step lower than the cylinder head?
A. Yes, sir, it is lower but it is over on the pilot. This sets out here.

Q. Were you sitting down on the ground? A. Yes, sir.

Q. This cylinder head was higher than you. A. And this step is lower than the cylinder head? A. Yes, sir. I didn't make any examination of that step to see whether it was out of repair or not. I went over it afterwards but I didn't make any examination. I can't recall that this engine was in a good many accidents, derailments and so forth.

(Witness left the stand.)

(41) T. J. BONDURANT, the second witness called and sworn on behalf of defendant, testified in chief as follows:

In July, 1915, I was employed at Elmore, West Virginia, with the Virginian Railroad. I am now employed at Newport News, with the Newport News Shipbuilding and Dry Dock Company. In July, 1915, I was round house foreman at Elmore; at that time I think. I don't remember how long I had had charge of the round house. I had the night shift a good while, then I was on the day shift quite a while, and I don't remember how long. I was there the day that Mr. Barrett fell from engine 600. I sent him out to do some work on this engine. I didn't see him fall. I saw him immediately after he fell. I was right near the engine, and as he turned or started towards the front of the engine on the running board I started towards the shop, and I heard a noise and looked around and he was sitting down on the step of the engine, as well as I remember, where he had fallen, and said he had hurt his leg. From looking at the pictures of engine 600 I don't remember just which step he was on but I know he was there at the front of the engine. As well as I remember he was sitting on this lower step here. I went up to where he was. He told me he believed his leg was broken, and I told him no, I didn't believe it was broke. He aimed to get up and said he couldn't walk on it, and I asked someone else to help me carry him to the shop, and I don't remember who it was, and I sent for Dr. Hunter to come down and examine his leg.

(42) Mr. Barrett didn't say anything about anything being wrong with the step that I remember of. The step was in good condition so far as I know, nothing wrong with it. I had been with the Company ever since they had that engine practically. I had occasion to examine it and to see the engine often.

Prior to the accident and since we were working the engine out of Elmore and I saw it every day at that time. Of course it didn't stay at Elmore all of the time. A part of the time the engine was at Princeton, but when it was at Elmore I would see the engine every day. There was nothing wrong with that step that I know of; it was in good condition so far as I know. I never repaired that step on the engine at all, and never had any repairs made to it that I can remember. I didn't know

T. J. BONDURANT.

anything about any crack in the angle iron that runs around the step. So far as I knew the step was secure and solid. If it hadn't been in good condition I would have had it repaired. It was made of steel, as well as I remember, and the tread was about a quarter of an inch thick I think, and the angle iron that goes around it was also about a quarter of an inch thick, I think. The tread of the step is perfectly rigid, and so far as I know a solid piece of steel, or at least it was supposed to be perfectly rigid.

ON CROSS EXAMINATION, the witness said:

I never made any special examination of that step to see whether it was out of repair or not. I never fell off that step. I never told Mr. Barrett that I fell off that step. I slipped off the steam chest down against that (43) step once. I slipped off the steam chest cover and struck my leg against that step. I didn't tell Robert Tiller that I fell off that step. I said to him that I came off that running board and I fell I supposed like Barrett did. But I slipped off the steam chest and struck my leg against that step in front of the engine.

That step was in good condition so far as I know. I never made any specific examination of it. I never had any repairs made to it. No repairs were made by direction of ether foremen so far as I know, though they could have been done. The step could have been straightened up and I not know anything about it. I don't remember exactly how long I was round house foreman after Mr. Barrett was hurt. He was off at the time I resigned as foreman and Mr. Hayes took my place.

I told Mr. Barrett that I slipped down and struck my leg against that step. I slipped off the steam chest and stepped down below the steam chest in front of it.

The witness being asked to specifically affirm or deny whether he told Mr. Barrett whether he had slipped off of that step he said: I don't remember having told him, because I never slipped off of it but slipped against it. I deny that I made the statement to Chester Cook or anybody else that I slipped off of that step, because I never did slip off of it.

RE-EXAMINATION, as follows:

Mr. Barrett's wife was away from Elmore at the

time he fell, and the next day or the day afterwards he told me he was going over to Athens where his wife was. I don't remember whether it was the next day or the second day afterwards, but it was shortly afterwards.

(44) (Witness left the stand.)

C. M. FLESHMAN, the third witness called and sworn on behalf of defendant, testified in chief as follows:

In July, 1915, I was employed at Elmore, West Virginia, and was there the day that Mr. Barrett hurt his leg. I was hostling, or taking care of engines. I handled all of the engines, and including engine 600. I was not present when Mr. Barrett fell but was there in five or six minutes afterwards I guess. He was then sitting over on the track, right opposite the pilot of the engine. I believe I asked him what was the trouble and he said he fell off the pilot of that engine, or, rather he said, "I fell off the front end of the engine." He didn't tell me from what point he fell. He didn't say anything about a broken step or anything being wrong with the step. I didn't have occasion to look over that engine that day but I had done so before. I was over it several times, some two or three times I will say. I didn't notice anything wrong with the steps leading up on the engine from the front. I don't know whether there were any cracks in this step referred to or not. As to the step being level, I should say the one coming off the running board, or both of them, dipped a little bit, but they were built that way, and were that way the first time I ever saw them. I think you will find both of them about the same way but not exactly perfectly level; they dip a little but (45) I think they were built that way. I have been handling that engine ever since it came from the Baldwin Locomotive Works off and on. There was never anything wrong with those steps during the time I have been handling it so far as my having any complaint about it was concerned and I don't know of any repairs done on the step, and don't know of any. I believe it was customary for all of these steps coming off the running board to be a little givy but they all seem to be just alike, they are built that way. They are made of steel or cast iron, I think. It is iron, there is no wood about them.

C. M. FLESHMAN.

On CROSS EXAMINATION, the witness said:

Mr. Barrett seemed to be pretty painfully hurt when I went up there. I assisted in carrying him over to the round house. I don't know that the edge of the step was any lower than the other one, but they didn't seem to be exactly on a level, they seemed to dip a little at the end. I couldn't say whether as much as an inch or an inch and a half lower than the back side or not; but it dipped a little bit, I think, in fact, I know. I noticed it shortly after the accident, and there is a dip in both of them, and both seemed to be about a like.

On being examined by the court the witness said: I had reference to the step coming off the running board; that is not the step we are talking about. The step I am talking about, the two of them, that dips, are the ones on the end of the running board and I suppose are not the ones we are concerned with here. I never examined it. It may be in perfect condition because I never examined it.

Cross Examination being resumed the witness said:

(46) These two steps on the running board dip about the same way. In the statement made in the presence of Mr. Barrett in your office in Roanoke on the 22nd about the step being an inch and a half lower on the outer edge I had reference to the other step, to the running board step. There is no name by which to distinguish the step we are concerned with from the running board step that I know of. It is a safety appliance on the front of the engine. It is a step on a lower level than the running board. It is a safety appliance step for getting on and off of the engine I suppose. When I said the step was springy I had reference to the running board step.

On RE-EXAMINATION, the witness said:

I went over these steps that day after this engine was brought out and Barrett was hurt. I found them in good condition, didn't find anything wrong with them. Yes, I went over the step we have just been talking about. It was all right so far as I know.

On RE-CROSS EXAMINATION, the witness said:

No, I never made any particular examination of either one of these steps, the one down where Barrett is supposed to have fallen off of, or the two up at the end of the running board.

(Witness left the stand.)

J. R. PETTITT, the fourth witness called and sworn on behalf of defendant, testified in chief as follows:

In July, 1915, I was employed by the Virginian Rail- (47) way at Elmore, West Virginia, and had been there ever since February, 1912. I was working in the shop on running repairs on engines. I was in the shop at the time Mr. Barrett fell off of engine 600. I didn't see the accident. I had been familiar with engine 600 ever since it had been on the road. I had occasion to see the engine often. As to there being anything wrong with any of the steps on this engine I will say that the main running board comes down to the side of the engine at the cab and goes out towards the front of the engine, and the step was at one time pushed pretty bad at the end, and I taken a big timber and kinda straightened it up a little bit, probably a year and a half or two years before this accident occurred. It was before we went down to the new round house. It was while there was an old car placed off down there to work at. That was at the end of the main running board, coming down by the side of the boiler. There wasn't anything else wrong with the steps that I ever noticed. As to the step right in front of the engine shown on picture, "Plaintiff's Exhibit No. 1", so far as I know that step was all right. I never noticed it being out of condition. That is a pretty rigid step, it was made of steel and iron. I didn't go out to the engine after the accident occurred. I saw Mr. Barrett in the washroom, where Dr. Hunter was present and dressing his leg, shortly after it happened. Mr. Barrett didn't make any statement that I remember of, only he said he fell from the step. I didn't know whether it was the running board step or step on the front of the engine. I think he said he fell from the step. He didn't say there was anything wrong with that step so far as I noticed, I (48) didn't go out to the engine, and didn't go out there

A. G. HOUSTON.

until the day Mr. Pearman was down there to take a photograph of the engine, and I then happened to be going out across to work on an engine on the main line and I stopped while they were taking the photograph. At the time Mr. Barrett said he slipped and fell on some step of the engine he didn't make any remarks that I remember about there being anything wrong with the step.

On CROSS EXAMINATION, the witness said:

I never made any close examination of that step, not to go up and examine it. It might have been out of repair, or the outer edge lower or slightly sloping and I not notice it. I didn't make any close examination, or any examination of it. On the 15th day of last June, at Elmore, West Virginia, while working as machinist and Chester Cook was my helper, and working there on an engine I didn't make a remark that if Barrett had treated other men like Bondurant did there would have been no trouble to prove the defective condition of the engine Barrett fell off of.

(Witness left the stand.)

A. G. HOUSTON, the fifth and last witness called and sworn on behalf of defendant, testified in chief as follows:

I am employed by the Virginian Railway as road foreman of engines, and have held that position since June, 1911. My position brings me in contact with engine 600. As to how often, that varies a good deal. Sometimes I am around that engine every day for a week, and then maybe I won't be around her for another week. So far as I know the steps on that engine have (49) been in good condition all the time. There have been no repairs made to them to my knowledge. I have frequent occasion to pass over the steps myself, and never found anything wrong with them. As to the step shown in the photograph and indicated by a cross-mark, there on the front of the engine, it is a flat piece of sheet metal about two or three feet long and about 10 or 12 inches wide, supported around the bottom by angle iron

and a bracket. It is a strong, substantial piece of iron. I don't know just how thick it is but it is something like perhaps, three-eighths of an inch thick or a little thicker. During the whole time I have been familiar with that engine there has not, to my knowledge, been anything wrong with that step.

ON CROSS EXAMINATION, the witness said:

I never made any special examination of that step. It would be possible for anything to be wrong with the step and I not know it, but a man going over that step frequently if there were anything wrong with it he would be very apt to notice it. Some days I go over that step as much as a dozen times, and then maybe I won't see it for a week or two. My duties call me all over the Deep Water Division. I do not have the division to Roanoke now, having given up the portion between Princeton and Roanoke something like four months ago. But is this accident occurred on the 15th of July, 1915, my territory extended from Roanoke to Deep Water and over the Winding Gulf District in addition. That embraced about 225 miles all told. I do not spend very much time in my (50) office, probably one day a week would be the average. I knew of trouble at one time with these two steps at the end of the running board on the right side of engine 600. I believe the end of the running board had been—well, I am not sure but I believe it had been damaged at sometime and had been repaired. I couldn't tell you just when that was but it was before the accident. It was disrupted in some way but repaired if I am not mistaken. I never knew much about this accident. The first I heard of it was when they were having the Machinists' Committee up at Princeton, and I didn't find out much about it at that time. I didn't have Elmore directly under my charge at that time and I wasn't interested in that part of it and so I didn't pay any attention to it. Engine 600 stopped at Elmore the greater part of time when not in use on the mountain.

(Witness leaves the stand.)

Defendant closed its evidence in chief.

S. D. BARRETT—CHESTER COOK.

(51)

PLAINTIFF'S EVIDENCE IN REBUTTAL.

S. D. BARRETT, the Plaintiff, and first witness in rebuttal, said on direct examination:

x

Mr. Bondurant told me while in the washroom the day of the accident, or just before I entered the washroom and I wouldn't say which, while he was carrying me in, that that was a bad step on engine 600, and that he had fallen off of it and struck his leg in the same way; that he sat down until he got over his sickness and then got up and went on about his work. I heard Charles Fleshman make a statement as to the condition of that step, the statement being made in your office in Roanoke on the 22nd day of February. He said he had examined the step from which I had fallen and that it was an inch or an inch and a half lower at the outer edge than at the back, and also said that all of the steps on that side of the engine were in bad condition.

(Witness leaves the stand.)

CHESTER COOK, the second witness called by plaintiff in rebuttal, testified in chief as follows:

I heard Mr. Bondurant make the statement about the time that Mr. Barrett brought this suit against the Virginian Railway, that he (Bondurant), had fallen off of the same step which Mr. Barrett had fallen off of and hurt his leg. Mr. John Pettitt told me about the 15th of June at Elmore, when he and I were working on an engine, that (52) if Mr. Barrett had treated the men like Mr. Bondurant had there wouldn't have been any trouble to prove that the engine was not in a safe condition.

On CROSS EXAMINATION, the witness said:

I am Chester E. Cook. I remember talking some to Mr. Hartigan, Claim Agent for the Virginian Railway about June 21st, 1915. I don't remember exactly the time. I put in a voucher for three hours and a half over-time at 31½c. per hour engaged in the investigation of the case of Barrett against the Virginian Railway Company, 95c., and received pay for it but I don't remember just when it was. I didn't tell Mr. Hartigan that I didn't

know anything about the case at all. I don't remember what I did tell him, it has been a good long while ago, and I can't remember altogether what I did tell him.

Being asked why he remembered so well what he told Mr. Pettitt and didn't remember what he told Mr. Hartigan, the witness said:

Well, sir, we were summoned to Roanoke last summer to the trial, and it was laid over, and it was as I remember about a week before the trial, that he was talking to me in the shop one morning just after we went to work, Mr. Pettitt was.

(Witness leaves the stand.)

End of all Evidence in the Case.

MOTION FOR DIRECTED VERDICT.

At the conclusion of all the evidence in the case the defendant moved the court to direct a verdict in its (53) favor, and the same was argued, and the court took the motion under advisement until Monday morning.

(54)

February 26, 1917.

This day came again the parties, by their attorneys, and also the same jury as on Saturday. And the court having considered the motion made by the defendant on Saturday to direct a verdict in its favor, and being of opinion for reasons set out in writing and this day filed, that the said motion should be granted, did read the said opinion to counsel and announce that the court would forthwith direct a verdict for defendant.

And thereupon the plaintiff, by counsel, moved the court to permit them to take a voluntary non-suit.

This motion was opposed by defendant's counsel, and as the court is of opinion that the motion comes too late, it was overruled, and to this action of the court, the plaintiff, by counsel, excepted.

And thereupon the court directed the jury to find a verdict for defendant, and to this action of the court the plaintiff, by counsel, excepted.

And thereupon the jury returned the following verdict:

"We, the jury, by the direction of the court, find for the defendant.

B. F. MOOMAW, Sr., Foreman."

And thereupon the plaintiff, by counsel, moved the court to set aside the said verdict and grant the plaintiff a new trial. This motion, the court after consideration, overruled, and to this action of the court the plaintiff (55) excepted.

It is therefore considered by the Court, that the plaintiff take nothing by his bill but for his false clamor be in mercy, that the defendant go hence without delay and recover of the plaintiff its costs in this behalf expended; and the plaintiff, by counsel, excepted to the judgment of the court.

(56) And this being all of the evidence, counsel for the defendant thereupon moved the court to direct the jury to find a verdict for the defendant, which motion the court sustained; and the plaintiff then and there excepted, and tenders this his bill of exception number 1, and prays that the same may be signed, sealed and made a part of the record, which is accordingly done this 23d day of March, 1917.

(Signed) HENRY C. McDOWELL, (Seal)

BILL OF EXCEPTION NO. 2.

(57) Filed March 23, 1917.

Be it further remembered that upon the trial of this case, after the plaintiff and defendant, to maintain the issue on their respective parts, had introduced the evidence set forth in Bill of Exception Number 1, which is hereby referred to and made a part hereof, and which the court certifies was all the evidence in the case; and after the court had announced its intention to sustain defendant's motion to direct a verdict for the defendant and filed its reason in writing, the plaintiff, by counsel, thereupon moved the court to permit him to take a voluntary non-suit, which motion was opposed by defendant's counsel; and the court, being of opinion that the motion came too late, overruled said motion, to which action of the court the plaintiff, by counsel, then and there excepted.

ed, and tenders this his Bill of Exception Number 2, and prays that the same may be signed, sealed and made a part of the record, which is accordingly done this 23d day of March, 1917.

(Signed) HENRY C. McDOWELL, (Seal)

BILL OF EXCEPTION NO. 3.

(58) Filed March 23, 1917.

Be it further remembered that, upon the trial of this case, after the plaintiff and defendant, to maintain the issue on their parts respectively, had introduced the evidence set forth in plaintiff's Bill of Exceptions Number 1, which is hereby referred to and made a part hereof, which the court certifies was all the evidence in the case; and after the court had instructed the jury to find a verdict for the defendant, as set forth in plaintiff's Bill of Exceptions Number 1, and the jury, having received the instruction of the court, returned the following verdict: "We, the jury, by the direction of the court, find for the defendant, B. F. Moomaw, Sr., Foreman;" thereupon the plaintiff, by counsel, moved the court to set aside said verdict and grant him a new trial, which motion the court, after consideration, overruled; and to this action of the court the plaintiff, by counsel, then and there excepted, and tenders this his Bill of Exception Number 3, and prays that the same may be signed, sealed and made a part of the record, which is accordingly done this 23d day of March, 1917.

(Signed) HENRY C. McDOWELL, (Seal)

ASSIGNMENT OF ERRORS.

(59) Filed March 23, 1917.

ASSIGNMENT OF ERRORS.

Now comes the plaintiff in the above entitled case, and files the following assignment of errors, upon which he will rely in his prosecution of the writ of error in said case from the judgment entered against him by this honorable court on the 26th day of February, 1917.

1.

That the United States District Court, Western District of Virginia, erred in directing the jury to return a verdict for the defendant, as set out in plaintiff's Bill of Exception Number 1.

2.

That the United States District Court, Western District of Virginia, erred in overruling the plaintiff's motion to allow him to take a voluntary non-suit, as set out in plaintiff's Bill of Exception Number 2.

3.

That the United States District Court, Western District of Virginia, erred in overruling the plaintiff's motion to set aside the verdict of the jury and grant him a new trial, as set out in plaintiff's Bill of Exception Number 3.

Wherefore, the plaintiff prays that said judgment may be reversed and a new trial awarded him.

S. D. BARRETT,
By WELBORN & JAMISON,
Plaintiff's Attorneys.

**MEMORANDUM REQUIRED BY RULE 14, SECTION 7, OF
THE RULE OF THE CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.**

(60) I, Frank J. Hall, Deputy Clerk of the United States District Court for the Western District of Virginia, at Roanoke, Virginia, certify as follows:

That the petition for writ of error was filed March 23, 1917.

That the order allowing writ of error is dated March 23, 1917.

That writ of error issued March 24th, 1917.

That the appeal bond is dated March 20, 1917; that the penalty thereof is \$150.00; that the names of the obligors are as follows: S. D. Barrett, Principal, and United States Fidelity and Guaranty Company is Sure-

ty; that the condition of the bond is to cover damages and costs.

That the citation is dated March 23, 1917. That service of the said citation was accepted March 24, 1917;

That the original papers mentioned in this memorandum have been sent to the Clerk of the Circuit Court of Appeals at Richmond.

Given under my hand this 28th day of March, 1917.

FRANK J. HALL,
Deputy Clerk.

UNITED STATES OF AMERICA,
Western District of Virginia, To-wit:

(61) I, Frank J. Hall, Deputy Clerk of the United States District Court for the Western District of Virginia, at Roanoke, do certify that the foregoing is a true transcript of the record and proceedings of the District Court of the United States for the Western District of Virginia, made up in accordance with the stipulation of counsel as to the papers to be included in the transcript filed in said cause on March 26th, 1917.

In testimony whereof, I hereunto set my hand and affix the seal of the said District Court this 28th day of March, 1917.

(Seal of Court) FRANK J. HALL,
Deputy Clerk.

**PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.**

No. 1521.

S. D. Barrett, Plaintiff in Error,

vs.

The Virginian Railway Company, Defendant in Error.

Error to the District Court of the United States for the
Western District of Virginia, at Roanoke.

March 30, 1917, transcript of record is filed and
the cause docketed.

Same day, the original petition for writ of error,
order allowing writ of error, writ of error, writ of error
bond, and citation are certified up under Sec. 7 of Rule
14.

Same day, the appearance of W. L. Welborn is en-
tered for the Plaintiff in Error.

Same day, the appearance of H. T. Hall is entered
for the Defendant in Error.

April 4, 1917, original exhibits (2 photos.) are cer-
tified up.

STIPULATION AS TO BRIEFS.

Filed April 4, 1917.

It is hereby agreed by and between counsel for
both parties in this case that the time for filing briefs
therein shall be extended as follows: Counsel for plain-
tiff in error may file their brief not later than May 5,
1917; counsel for defendant in error may file their reply
brief not later than May 15, 1917; and counsel for plain-
tiff in error may file their reply brief not later than May
20, 1917.

WELBORN & JAMISON,
Counsel for Plaintiff in Error.
H. T. HALL,
Counsel for Defendant in Error.

April 5, 1917, the appearance of G. A. Wingfield is entered for the Defendant in Error.

April 7, 1917, twenty-five copies of the printed record are filed.

May 28, 1917, (May Term, 1917,) cause came on to be heard before Pritchard, Knapp and Woods, Circuit Judges, and is argued by counsel and submitted.

OPINION.

Filed July 5, 1917.

United States Circuit Court of Appeals.
FOURTH CIRCUIT.

No. 1521.

S. D. BARRETT, Plaintiff in Error,

versus

THE VIRGINIAN RAILWAY COMPANY, Defendant in Error.

In Error to the District Court of the United States for
the Western District of Virginia, at Roanoke.

(Argued May 28, 1917.

Decided July 5, 1917.)

Before PRITCHARD, KNAPP and WOODS, Circuit Judges.

W. L. WELBORN (WELBORN & JAMISON and JOHN G.
CHALLICE on brief) for plaintiff in error, and
H. T. HALL and G. A. WINGFIELD (HALL
& APPERSON on brief) for defendant
error.

PRITCHARD, Circuit Judge:

This is a suit instituted by plaintiff in error, plaintiff below, in the District Court of the United States for the Western District of Virginia, to recover damages on account of injuries sustained by plaintiff, who was the foreman of the roundhouse, while attempting to clean out a sand pipe which was stopped up. Plain-

tiff was employed by the defendant as a machinist at Elmore, West Virginia, at which a roundhouse is maintained where engines are stored and certain repairs are made.

Among other things, plaintiff, by virtue of his employment, was required to repair engines and other rolling stock at that point. The engine upon which plaintiff was working at the time he sustained the injury, was being used and had been used for some time, in pusher and helper service. This particular engine had been placed upon what is known as the "ready track" to be employed in taking a train out of Elmore. After being placed, the engineer in charge discovered that the sand pipe was stopped up, and plaintiff was requested to clean it out. In order to perform this service it was necessary for the plaintiff to climb upon the engine. In front of the engine there were steps leading from the ground up over the pilot to the running board. In performing this service plaintiff made several trips up on the engine, and while coming down on the last trip he slipped and fell and sustained the injury upon which this action is based.

Plaintiff says that shortly after he had fallen and had been removed by other employees to a point several feet in front of the engine, he looked at the engine and remarked that the step from which he slipped and fell was slanting from one to one and a half inches forward. However, there was no evidence offered tending to corroborate this statement by the other employees who were present. The other employees present testified that they did not observe that the step was slanting or that

there was anything wrong with it. In addition to the plaintiff's testimony plaintiff introduced two other witnesses who said that they examined this step a month or two after the accident and that it was slanting forward, the front portion of the step being from one to two inches lower than the rear portion.

Both the day and night foreman of the roundhouse at Elmore, who had charge of keeping the engine in

repair, testified that they never knew there was anything wrong with the step. The engineer who had been running the engine and the hostler who had charge of it in the roundhouse also testified that they had no knowledge of any defect in the step. There was no evidence produced by the plaintiff to show how the alleged defect in the step was caused or how long it had been in that condition.

When all of the evidence had been introduced, the defendant moved the Court to direct the jury to return a verdict in favor of the defendant. This motion was opposed by the counsel for the plaintiff, and after the motion was fully argued the Court took the same under advisement from Saturday afternoon until Monday morning. When the court convened Monday morning the Judge rendered an opinion in writing, which is made a part of the record, sustaining the defendant's motion to direct a verdict. After the Court had rendered its decision, the plaintiff asked to be permitted to take a voluntary non-suit. The Court refused to grant plaintiff's request, and directed the jury to return a verdict in favor of the defendant, and judgment was entered accordingly. The plaintiff excepted, and the case now comes here on a writ of error.

Only two points are involved in this controversy; first, as to whether the Court below erred in directing a verdict in favor of the defendant; second, as to whether the Court erred in refusing to permit the plaintiff to take a non-suit. It is earnestly contended by counsel that plaintiff's injury was due to the failure of the defendant to provide a safe and suitable place in which plaintiff was required to work at the time he was injured; in other words, it is insisted that the step on the engine was carelessly and negligently constructed and that this was the proximate cause of plaintiff's injury. While it is well settled that the master must exercise ordinary care in providing for the use of servants, reasonably safe, sound and suitable machinery and appliances, and also to use ordinary care to discover and repair defects, the master

does not insure or guarantee that the machinery or appliances are in a safe and suitable condition, and where defects exist the master is not held to be guilty of negligence unless it appears that he knew, or by the exercise of ordinary care could have known, that such machinery and appliances had become defective and were in an unsafe condition. In other words, it must appear, in order to entitle the plaintiff to recover, that the master had either actual or constructive notice of the defect alleged to have caused the injury, and these facts must be established by legal evidence.

Washington &c. Railway Co. vs. McDade, 135 U. S. 554.

Norfolk & Western Ry. Co. vs. Reed, 167 Fed. 16.
Virginia, etc., Wheel Co. vs. Chalkley, 33 Va. 62.

There are no facts or circumstances from which the jury could have inferred that the master had either actual or constructive notice of the alleged defective condition of the step. To entitle the plaintiff to recover, the burden is upon him to either show that defendant had actual or constructive notice.

In determining this point, it should be borne in mind that no witness testified that this step was defective before the accident occurred. Indeed, the first evidence we have of the existence of the alleged defective step is the testimony of the plaintiff, who says that he did not discover it until after he had been injured. From the nature of things, the respective engineers, firemen and other employees, who had from time to time had charge of this engine, would have observed as glaring a defect as the one described by the plaintiff; therefore, if the step was defective in any respect it appears that the defendant Company could not have had either actual or constructive knowledge of the same prior to the time plaintiff was injured. It further appears that no one ever fell from the step or was injured in any way on account of its condition.

Counsel for plaintiff insists that the defective condition

of the step was in plain view and could have been seen even by casual observation; and, further, if the foreman had exercised even ordinary care as to the condition of the engine, he could have discovered the same. It appears from the testimony of plaintiff that the accident occurred when he was returning from the third trip to the point where he was working on the engine, and it further appears that he used this step each trip. If the defect was so obvious and easily discovered the plaintiff would undoubtedly have observed it, but as we have stated, he testified positively that he never discovered that anything was wrong with the step until after he had fallen to the ground, and then observed it.

The plaintiff in rebuttal, among other things, testified that Bondurant, the foreman, told him that he had previously fallen off of the same step, injuring his leg in the same way. The foreman testified positively that he never knew anything about the defect and that he never told plaintiff that he had fallen from the engine on account of the defective condition of the step, and injured his leg. Plaintiff also introduced a witness by the name of Cook, in rebuttal, who testified that Bondurant had told him that he had fallen off of the same step and injured his leg prior to the time plaintiff sustained his injury. The testimony of this witness was introduced for the purpose of contradicting the foreman, who had been asked on cross-examination if he had not been injured prior to the time the plaintiff was hurt, by slipping from the engine on account of the defective condition of the step. This testimony could only be considered for the purpose of contradicting and discrediting Bondurant as a witness, and was in no sense substantive evidence from which it could be inferred that the step was in a defective condition anterior to the time of the accident in question. This rule is so well settled that we do not deem it necessary to cite any authority in support of the same.

If, as contended by the plaintiff, the defective condition of the step was so patent as to be readily observed

by everyone, and it appearing as it does that the plaintiff before he was injured made three trips, each time using this particular step, then he would be deemed to have assumed the risk incident to his employment, the rule being that if he knew, or by the exercise of ordinary care, could have known of the defective condition of the step, he would not be entitled to recover.

The second question involves the point as to whether the plaintiff was entitled, as a matter of right, to take a voluntary non-suit after the Court had decided to direct a verdict for the defendant.

This Court in the case of *Parks vs. Southern Railway Company*, 143 Federal Reporter, 276, in discussing this phase of the question, says:

“At common law the action of the court upon a motion for a non-suit was not a discretionary one, but the plaintiff, as of right, could at any time before verdict exercise this privilege; and this is now substantially the rule in North Carolina. But the more reasonable practice, certainly so far as the federal courts are concerned, is that the plaintiff has the right to take a non-suit at any time before the case has been submitted to the judge or jury for determination. The plaintiff upon the making of a motion to instruct a verdict against him, that being one of the methods in the federal court of finally disposing of the cause, should then elect whether or not he will take a non-suit, and not submit his cause upon a full hearing of that motion to the court, and take chances of an adverse decision thereon.”

In view of what we have already said as respects this point, we do not deem it necessary to enter into

a further discussion of the same, feeling as we do that the plaintiff was not taken by surprise and that he was not deprived of introducing any newly discovered evidence before the case was submitted to the Court for its final determination. For the reasons stated, the judgment of the lower court is

Affirmed.

JUDGMENT.

Filed and entered July 7, 1917.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1521.

S. D. Barrett, Plaintiff in Error,

vs.

The Virginian Railway Company, Defendant in Error.

In Error to the District Court of the United States for
the Western District of Virginia.

This cause came on to be heard on the transcript of
the record from the District Court of the United States
for the Western District of Virginia, and was argued by
counsel.

On consideration whereof, It is now here ordered
and adjudged by this Court that the judgment of the
said District Court, in this cause, be, and the same is
hereby, affirmed with costs.

J. C. PRITCHARD,
U. S. Circuit Judge.

July 7, 1917.

ORDER STAYING MANDATE.

Filed and entered July 10, 1917.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1521.

S. D. Barrett, Plaintiff in Error,

vs.

The Virginian Railway Company, Defendant in Error.

Error to the District Court of the United States for the Western District of Virginia, at Roanoke.

Upon the application of the plaintiff in error, by his attorney, W. L. Welborn, and for good cause shown,

It is Ordered, that the mandate in this cause be and the same is hereby stayed pending the application of the plaintiff in error in the Supreme Court of the United States for a writ of certiorari to this Court, provided the same is presented in said Supreme Court on or before October first, 1917.

J. C. PRITCHARD,
Senior Circuit Judge, Presiding.

July 10, 1917.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 20th day of August, A. D., 1917.

(Seal of Court)

HENRY T. MELONEY,
Clerk U. S. Circuit Court of
Appeals, Fourth Circuit.
By CLAUDE M. DEAN,
Deputy Clerk.

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 9th day of November, 1917, by annexing hereto a certified copy of the stipulation of Attorneys of record, that the certified copy of the transcript of the record in said case, which is on file in the office of the Clerk of the United States Supreme Court, is to be taken as a return to the writ of certiorari granted by said court in said case on November 5, 1917; and the Clerk of the United States Circuit Court of Appeals, Fourth Circuit, is hereby authorized to send up to the United States Supreme Court a certified copy of this stipulation as his return to said writ.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 1st day of December, A. D. 1917.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

In the Supreme Court of the United States.

Number 689, of October Term, 1917:

S. D. BARRETT, Petitioner,

v.

THE VIRGINIAN RAILWAY COMPANY, a Corporation, Respondent.

Stipulation.

It is hereby stipulated and agreed by and between counsel for the petitioner and counsel for the respondent in this case that the certified copy of the transcript of the record in said case, which is on file in the office of the Clerk of the United States Supreme Court, is to be taken as a return to the writ of certiorari granted by said court in said case on November 5, 1917; and the Clerk of the United States Circuit Court of Appeals, Fourth Circuit, is hereby authorized to send up to the United States Supreme Court a certified copy of this stipulation as his return to said writ.

Given under our signatures this 13th day of November, 1917.

W. L. WELBORN,
Counsel for Petitioner.
HALL & APPERSON,
Counsel for Respondent.
G. A. WINGFIELD,
Of Counsel for Respondent.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of Counsel is a true copy of the original filed November 30, 1917, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 1st day of December, A. D. 1917.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which S. D. Barrett is plaintiff in error, and The Virginian Railway Company is defendant in error, No. 1521, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the ninth day of November, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26,156. Supreme Court of the United States, No. 689, October Term, 1917. S. D. Barrett vs. The Virginian Railway Company. Writ of Certiorari.

[Endorsed:] File No. 26,156. Supreme Court U. S., October term, 1917. Term No. 689. S. D. Barrett, Petitioner, vs. The Virginian Railway Company. Writ of certiorari and return. Filed December 3, 1917.

In the Supreme Court of the United States

S. D. BARRETT, PETITIONER,

v.

THE VIRGINIAN RAILWAY COMPANY,
A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

To the Honorable the Supreme Court of the United States:

This petitioner, S. D. Barrett, respectfully shows to this honorable court:

(1) That this petitioner commenced an action of trespass on the case, arising under An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases, approved April 22, 1908, against the respondent in the district court of the United States for the western district of Virginia, which action was tried before a jury at the February term, 1917, of said court;

(2) That at said trial the petitioner introduced evidence proving or reasonably tending to prove that in July, 1915, he was in the employment of the respondent as a machinist at Elmore, West Virginia, where the respondent has a round-house and yard; that on the day he was injured an extra pusher engine was on the "ready track" in the yard, where

engines were placed for crews to call for them; that the crew for this engine was ready to go out with it; that before they started the engineer found that the sand pipes were stopped up with wet sand; that he sent to the shop for a machinist to open the pipes, and the petitioner was instructed by the foreman to work on them and clean them out; that when the petitioner got to the engine, he began working on one of the sand pipes, and found difficulty in getting it open; that it became necessary to take the pipe off in order to clean it out; that after he had gotten the wet sand out he went up over the front of the engine and over the running board and connected the pipe at the top; that he then started back down the same way to connect it at the bottom, that is, over the running board and by-pass valve and steps to the front of the engine and off on the ground, which is the usual way to come down and the way he should have come; that he had gotten part of the way down, when his right foot slipped off of one of the steps, which was defective and slanting, causing him to fall and his left leg to come down behind and hit across the step; that thereby the large bone in his leg was fractured and he was otherwise injured; that it was in the day time when this occurred; that he looked at the step almost immediately after he had fallen from it; that it was about 6 feet from the ground; that he saw that, instead of being horizontal, it was cracked, broken and slanting, the front being about $1\frac{1}{2}$ inches lower than the back; that it was made of a flat piece of boiler iron, perfectly smooth on top, and was from 10 to 12 inches wide, about 18 inches long and about $\frac{3}{16}$ of an inch thick; that the angle iron, attached beneath the step to support it and to prevent it from springing, had a crack in it and was broken, and would not wholly support the step; that the step was supposed to be perfectly rigid, and this angle iron was the only support provided for it; that the angle iron was about $1\frac{1}{2}$ inches wide, and was very strong and hard to bend; that about 30 days afterward the petitioner examined the step more carefully and saw that the angle iron had two cracks in it; that the respondent had no inspectors at Elmore; that the machinists did their

own inspecting, and inspected running gears and engines underneath, but that their duty of inspection did not extend to running boards or steps; that the respondent knew or by the exercise of ordinary care could have known of the defective condition of the step; that the roundhouse foreman was near the engine when the petitioner fell; and that he had never made any special examination of the step to see whether it was out of repair or not.

(3) That when the evidence was concluded the respondent moved the court to direct a verdict for the defendant; that thereupon the court adjourned until Monday; that on Monday the court, having considered the motion, and being of the opinion that the motion should be granted, read his opinion to counsel and announced that he would direct a verdict for the defendant; that thereupon the petitioner, by counsel, moved the court to be permitted to take a voluntary nonsuit, which motion was opposed by counsel for the respondent; that the court then overruled said motion, and to this ruling the petitioner, by counsel, excepted; that the court thereupon directed the jury to find a verdict for the defendant, and to this action of the court the petitioner, by counsel, excepted; that the jury thereupon found a verdict for the defendant; that the petitioner, by counsel, then moved the court to set aside said verdict and grant him a new trial; that the court overruled this motion, and to this action of the court the petitioner, by counsel, excepted. The court then gave judgment for the defendant, and the petitioner, by counsel, excepted.

(4) That the petitioner duly applied for and obtained a writ of error to have said judgment reviewed by the United States circuit court of appeals, fourth circuit; that the case was argued before said court on May 28, 1917, and submitted; that on July 7, 1917, said court rendered its decision and entered judgment affirming the judgment of the district court; and that a certified copy of the entire record in said case in said district court and in said circuit court of appeals is hereby furnished, attached to and made a part of this petition, and

marked "Exhibit A", in compliance with rule 37 of this honorable court.

(5) Your petitioner is advised and believes that the judgment of said United States circuit court of appeals is erroneous, and that this honorable court should require the case to be certified to it for its review and determination, in conformity with section 3 of an act entitled "An Act to Amend the Judicial Code, to Fix the Time when the Annual Terms of the Supreme Court shall Commence, and further to Define the Jurisdiction of that Court," approved September 6, 1916; the judgment of said circuit court of appeals, entered July 7, 1917, being made final in said court by the provisions of said section 3 of said act.

(6) The reason why a writ of certiorari should be granted in this case is that said circuit court of appeals erred in holding that the rulings of the trial court in granting the motion to direct a verdict for the defendant and in overruling the petitioner's motion for leave to take a voluntary nonsuit were right. These rulings were wrong, and should have been so declared by said circuit court of appeals.

Whereupon, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States circuit court of appeals, fourth circuit, commanding said court to certify and send to this court on a day certain to be designated a full and complete transcript of the record and all of the proceedings of said circuit court of appeals in said case, entitled "S. D. Barrett, Plaintiff in Error v. The Virginian Railway Company, Defendant in Error, Number 1521," to the end that said case may be reviewed and determined by this court as provided in section 3 of an act entitled "An Act to Amend the Judicial Code, to Fix the Time When the Annual Terms of the Supreme Court Shall Commence, and further to define the Jurisdiction of that Court," approved September 6, 1916, or that your petitioner may have such other or further relief in the premises as this court may deem appropriate and in conformity with the provisions of said act of congress and the laws of the

United States; and that said judgment of said circuit court of appeals may be reversed by this honorable court, and the case remanded for a new trial.

S. D. BARRETT, Petitioner.

By Counsel.

WELBORN and JAMISON,

JOHN G. CHALLICE,

Counsel for Petitioner.

CERTIFICATE.

I, W. L. Welborn, an attorney practising in the United States Supreme Court, do hereby certify that I have read the foregoing petition; that I verily believe the United States circuit court of appeals, fourth circuit, has committed reversible error in its opinion in said cause, affirming the judgment for the respondent in the district court for the western district of Virginia; that the judgment of said circuit court of appeals is erroneous and should be reversed; that the judgment of said district court in favor of the respondent should be reversed and a new trial awarded; and that this court should grant the petition praying for a writ of certiorari to said United States circuit court of appeals, fourth circuit.

W. L. WELBORN.

State of Virginia,
City of Roanoke, towit:

Subscribed and sworn to before me this 10th day of September, 1917.

My commission expires April 9, 1918.

PHILIP B. WEAVER,

Notary Public.

ARGUMENT.

There are two questions in controversy :

(1) Should the circuit court of appeals have affirmed the direction of a verdict for the respondent?

(2) Should that court have affirmed the refusal to let the petitioner take a voluntary nonsuit?

(1)

Under the federal employers' liability act, which governs the case, if the evidence proves or reasonably tends to prove that the respondent was guilty of any negligence causing or contributing to the injury, the case should be submitted to the jury. This rule is not disputed. The question is whether or not the evidence proves or reasonably tends to prove that the respondent was guilty of such negligence.

It is not denied that the step the petitioner fell from was defective at the time he fell, though certain of the respondent's witnesses say they did not observe the defect. It was broken and slanting. It is also not disputed that the defective condition of the step was the cause of the petitioner's fall and consequent injury. Therefore, if the respondent knew of the defect, or should have known of it in the exercise of ordinary care, it was guilty of negligence causing or contributing to the injury.

The step was on the front part of the engine, about 6 feet from the ground. It was made of a flat piece of boiler iron, perfectly smooth on top, and was from 10 to 12 inches wide, about 18 inches long and about 3/16 of an inch thick. It was supposed to be rigid. An angle iron about 1½ inches wide, running beneath the outer edge of the step, was the only support provided to keep it from springing. On the day the petitioner fell this angle iron had a crack in it and was broken, and would not wholly support the step; and the step was slanting, so that the forward edge was about 1½ or 2 inches lower than the back. It was the custom for employes to use

this step in going on the engine and off again to the ground.

The engine had been placed on the "ready track," where the crews call for their engines, and the crew had taken charge of it, when the petitioner, who was a machinist, was summoned from the roundhouse to clean out a sand pipe on the side of the engine which was clogged up. He had cleaned it out and connected it back at the top, and was coming down to connect it at the bottom when he slipped from the defective step and was injured. The roundhouse foreman was right near the engine while the petitioner was doing this work, and had just started back toward the shop when he fell. He had never made any special examination of the step to see whether it was out of repair or not. After the petitioner had fallen, he looked up from where he sat on the ground some feet away to ascertain why he had fallen, and saw the defective condition of the step.

The evidence therefore proves that the step was defective when the petitioner fell, and that its defective condition was visible on inspection. The roundhouse foreman had charge of the work and exercised supervision over it, and had reasonable opportunity to observe the defective condition of the step and to take precaution against injury arising from it. If he was negligent in not seeing it, his negligence is imputed to the respondent. It can not be said as a matter of law that he was not negligent. It was a jury question.

Further, the defect was necessarily preexisting in its nature. A step made of iron, and constructed so it is normally rigid, does not become broken, slanting, cracked, and in a springing condition, except through long continued use or by being subjected to a heavy blow, such as may be caused by the falling of a heavy object or by the impact of a collision. Proof of the defective condition of the step and proof that the engine had been stationed on the "ready track" for service combine to prove that such defective condition necessarily commenced at some time in the past. Before sending the engine out for service, the roundhouse foreman or some other representative of the master should, in the exercise of ordinary care,

have discovered the condition of the step and had it remedied. It is an important matter for railroad engines to be in proper condition when in service, as a safeguard to life and limb. They should be carefully inspected before they are sent out, so as to be free from defects. The trial court in its opinion expressed the view that if the step had been damaged in a collision, it might have occurred so shortly before the petitioner's injury that the respondent would not be liable for the condition of the step. Such a holding is clearly erroneous. If the step was damaged in a collision, the respondent knew it or ought to have known it, and in either case was guilty of negligence in sending it out for service. This was a jury question.

Furthermore, the evidence proves that the inspection system of the respondent at Elmore was absolutely inadequate. It had no inspectors there whatever. This fact is uncontradicted. As a result, the machinists did their own inspecting. But their duty of inspection did not extend to running boards or steps. It is evident from the testimony that the inspecting done by the machinists was to see that the mechanical part of the engine was in operating condition, and not to see that the engine was in a safe condition as a place of work. It appears, therefore, that the running boards and steps were not included in the inspection system, and were not regularly inspected. Proof of the preexisting nature of the defect in the step makes this evidence significant. It proves negligence in failing to discover the defect.

The circuit court of appeals took the position that the respondent was not shown to have had notice of the defect, and that it was therefore not liable. It was wrong. Whether it had actual notice or not we do not know, but it is certainly charged with constructive notice. A master can not provide an inadequate inspection system, not embracing steps and running boards of engines, and escape liability for injuries to a servant resulting from a defect in a step which is necessarily preexisting on the ground that it had no notice of the defect. Otherwise there would be a loophole in the safe place rule

which would encourage negligent management and lead to disastrous results. Furthermore, it is not incumbent on a plaintiff, in order to establish the fact of constructive notice, to prove just how the defective condition arose and over what length of time it extended. It is sufficient to prove that the defect was such as to be necessarily preexisting in nature and that the respondent should have discovered it in the exercise of ordinary care. The petitioner did that in this case, and he was entitled to have the question submitted to the jury. The evidence that certain employes of the respondent had no notice of the defect, so much relied upon by the circuit court of appeals, is purely negative in character and does not in the least prove the nonexistence of the defect. They may have known it and failed to inform the petitioner. On the contrary, it adds weight to the petitioner's proof that the respondent did not use ordinary care to discover its existence.

The circuit court of appeal accepts as true the testimony of one of the respondent's witnesses that the petitioner made three trips up and down over the defective step, and holds that if the defective condition of the step was obvious he assumed the risk of injury. In doing so, it ignores the petitioner's positive testimony to the effect that on the first two trips up and down he used a different route, that it was on the third trip that he first used the step, and that he had therefore been over it only once before he fell. Attention is further called to the fact that, while the condition of the step was sufficiently obvious to be discovered on ordinary inspection, the petitioner had no time to stop and examine or inspect the steps and running board of the engine. The crew was waiting and the sand pipe had to be fixed and he was fixing it. His attention was on his work, not on the condition of the steps and running board, which he naturally considered safe. The evidence being conflicting as to how often he had passed over the step, and showing that he had little or no opportunity to observe its condition, it is clearly wrong to say as a matter of law that he assumed the risk of injury resulting from it. The most that

can be said is that it was a question for the jury to pass on in the light of all the circumstances.

The fact that the engine had been placed on the "ready track" for service and that the crew had been called and had taken charge of it was in itself tantamount to a declaration that the engine and all its accessories had been inspected and found in proper condition for use. If the step was defective at this time, the respondent is liable, because those whose duties required them to inspect the engine and remedy such defects either failed to inspect it, or if they inspected it failed to discover the defect, or if they discovered it failed to have it repaired. It was in their charge, and when they transferred it to the "ready track" they in effect pronounced it ready for use. From such circumstances the jury could have drawn the reasonable inference that the respondent transferred the engine to the "ready track" and turned it over to the crew in a defective condition, without using ordinary and reasonable care to inspect it and put it in proper condition. The further circumstance that the defective condition of the step was necessarily preexisting in its nature is a basis for the same inference. These circumstances prove that the defective condition had existed long enough for the respondent to have had full opportunity to discover and remedy it, and upon them the jury could have based a finding that it was negligent in furnishing the engine for service in an unsafe and defective condition. The assertion of the trial court, affirmed by the court of appeals, that the injury to the step might have occurred immediately prior to the petitioner's fall, and that the respondent is therefore not chargeable with notice of it, is simply begging the question. It is not only contrary to the evidence, but is contrary to reason and common knowledge. If the condition of the step was such as is caused by the impact of a collision or by the falling of some heavy object, and if such a disaster occurred immediately prior to the time when the petitioner sustained his injuries, as suggested in the trial court's opinion, the engine would have been rendered for a time utterly unfit for service and would have been left in the

roundhouse for overhauling and repairs, instead of being placed on the ready track for service, because it would have been impossible for such a happening to have occurred without other parts of the engine being damaged, in addition to the step. The position of the step on the engine alone demonstrates that, to say nothing of common knowledge of engines, because it was situated at such a protected place on the engine that if the engine had collided with some other engine or car or train or heavy object with such force as to produce the defective condition shown to have existed in the step, other parts of the engine would first have received the force of the impact or blow, which could not reach and damage the step until the barriers in the way were disrupted. In the very nature of things such a happening could not have taken place so close upon the time of the petitioner's fall from the step that the respondent did not know of it or did not have full opportunity to ascertain the extent of its consequences. Such occurrences disable engines for days, if not for weeks or months. The respondent must of necessity have known of the defective condition of the step or had every opportunity to discover it. In order to meet the proposition of the trial court that the injury to the step might have arisen a few moments before the petitioner fell from it, we moved for leave to take a voluntary nonsuit, so that evidence could be produced showing that no such disaster occurred to produce the injury immediately prior to the petitioner's fall.

The rule that notice of a defect may be proved by circumstantial evidence is based not only on sound reason, but is fully sustained by the authorities.

Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. Ed. 1188.

Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. Ed. 1136.

Union Pacific R. Co. v. Snyder, 152 U. S. 684, 38 L. Ed. 597.

Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 37 L. Ed. 1107.

Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. Ed. 829.

Republic Elevator Co. v. Lund, 45 L. R. A. (N. S.) 707, 196 Fed. 745.

Leary v. Houghton County Traction Co., 137 N. W. 225, 45 L. R. A. (N. S.) 359.

Young v. Snell, 86 N. E. 282, 19 L. R. A. (N. S.) 242.

Twombly v. Consolidated Electric Light Co., 64 L. R. A. 551.

Prosser v. Montana Central R. Co., 30 L. R. A. 814.

Richmond & D. R. Co. et als. v. Burnett, 14 S. E. 372, 88 Va. 538.

Goodrich v. N. Y. Cent. & H. R. R. Co., 5 L. R. A. 750.

Labatt's Master and Servant, articles 1023 and 1024.

26 Cyc. 1146.

Furthermore, this court has established the rule that the question of negligence is one of law for the court only when the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, that a case should not be withdrawn from the jury, unless the conclusion follows as a matter of law that no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish.

Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 53 L. Ed. 984.

Gardner v. Michigan Central R. Co., 150 U. S. 349, 37 L. Ed. 1107.

Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. Ed. 829.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. Ed. 485.

The rule has also been stated by this court as follows: "Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether

the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them."

Richmond & Danville R. Co. v. Powers, 149 U. S. 43, 37 L. Ed. 642.

Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. Ed. 213.

Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. Ed. 235.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745.

When it is considered, therefore, that the respondent had no inspectors at Elmore and no system of inspection extending to steps and running boards of engines; that the engine was placed on the "ready track" for service with a step in a defective condition that was necessarily preexisting in its nature; that the defective condition of the step was visible on inspection; and that even after the engine had been placed on the "ready track" the roundhouse foreman, who had supervision over engines, was present prior to the petitioner's fall and had full opportunity to discover such defective condition; it is clear, in the light of the authorities cited, that the question whether or not the respondent had notice of such defective condition, or should have had notice of it in the exercise of ordinary care, should have been submitted to the jury.

For the reasons given above, the circuit court of appeals should not have affirmed the action of the trial court in directing a verdict for the respondent. By doing so it committed reversible error.

(2)

Section 914 of Fed. Rev. Stat., 4 Fed. Stat. Anno. 563, known as the Conformity Act, is as follows:

"The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall

conform, as near as may be, to the practise, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which circuit or district courts are held, any rule of court to the contrary notwithstanding."

Section 3387 of the Virginia Code, which was in effect at the time of the trial of this case, is as follows:

"A party shall not be allowed to suffer a nonsuit unless he do so before the jury retire from the bar."

Upon the question whether or not a federal district court is required by the Conformity Act to conform to the practice and mode of proceeding in civil causes prevailing in the state within which the district court is held with reference to the right of a plaintiff to suffer a voluntary nonsuit, there is a sharp conflict between the decisions of the circuit court of appeals of the fourth circuit and the decisions of the circuit courts of appeals of other circuits.

In three cases arising in North Carolina the circuit court of appeals of the fourth circuit refused to conform to the practice and mode of proceeding fixed by the state statute, providing in effect that the plaintiff may suffer a nonsuit at any time before verdict; but followed what it denominated a more reasonable practise, and held that a motion for leave to suffer nonsuit should be denied, although such motion was made before submission of the case to the jury. In the case at bar the court followed these prior decisions, and refused to follow the established practise and mode of proceeding fixed by the Virginia statute.

In the following cases the circuit and district courts and circuit courts of appeals of other circuits, acting under the provisions of the Conformity Act, have consistently followed the established state practise with reference to the right of a plaintiff to suffer a voluntary nonsuit.

Wolcott v. Studebaker et al., 34 Fed. 8 (Ill.).
Aetna Life Insurance Co. v. Township of Lakin,
59 Fed. 989 (Kan.).

Gassman v. Jarvis, 94 Fed. 603 (Ind.).
 Chicago, M. & St. P. R. Co. v. Metalstaff, 101
 Fed. 769 (Mo.).
 Drummond v. Louisville & Nashville R. Co., 109
 Fed. 531 (Ill.).
 Duffy v. Glucose Sugar Refining Co., 141 Fed.
 206 (Iowa).
 Meyer v. National Biscuit Co., 168 Fed. 906 (Ill.).
 Knight v. Illinois Central R. Co., 180 Fed. 368
 (Ky.).
 Worthington v. McGough, 192 Fed. 512 (Ohio).
 Rhode v. Duff et al., 208 Fed. 115 (Neb.).
 Whitted v. Southwestern Telegraph and Tele-
 phone Co., 217 Fed. 835 (Ark.).

The case of Knight v. Illinois Central R. Co., supra, de-
 cided in 1910 by the circuit court of appeals for the sixth cir-
 cuit, sitting in Kentucky, exhaustively deals with the ques-
 tion of the conformity to state practise by the federal courts
 under the Conformity Act; reviews the cases; and points out
 with particularity what proceedings the statute applies to and
 to what proceedings it does not apply. It expressly holds that
 the statute applies to Civil Code of Procedure of Kentucky,
 section 371, permitting a plaintiff to dismiss without prejudice
 before final submission of the case to the jury.

In that case, at the conclusion of the evidence, the de-
 fendant moved that the jury be instructed to find for the de-
 fendant. The court thereupon excused the jury until the fol-
 lowing morning, meanwhile hearing argument upon the mo-
 tion. At its conclusion he announced to the attorneys that
 upon the reasons then stated he would sustain the motion,
 and that the jury would be directed to find for the defendant
 upon the convening of court the next morning. On the open-
 ing of court the next day, before the jury had been instructed,
 the plaintiff moved to dismiss the case without prejudice. The
 defendant's objection to such action was sustained and the
 jury was instructed to find for the defendant, a verdict accord-
 ingly being rendered and judgment entered thereon.

The circuit court of appeals reversed the judgment, hold-

ing that the state statute was binding on the federal court, quoted the Conformity Act mentioned above, and said:

"Decisions upon the precise question presented here are not numerous, nor are they harmonious. The United States circuit court of appeals of the fourth circuit has in two cases held that the state practise prevailing in North Carolina, permitting a plaintiff to submit to nonsuit after the conclusion of the evidence and after a motion by the defendant for direction of a verdict had been submitted and sustained, is not binding on the federal courts. *Huntt v. McNamee*, 141 Fed. 293, 72 C. C. A. 441; *Parks v. Southern Railway Co.*, 143 Fed. 276, 74 C. C. A. 414. The courts of appeals of the seventh and eighth circuits have held the contrary. Thus, a statute of Illinois that "every person desirous of suffering a nonsuit on trial shall be barred therefrom unless he do so before the jury retire from the bar" has been held binding upon the federal courts sitting within that state, and to require the permitting of nonsuit even after the announcement of the judge's decision sustaining the motion for a directed verdict for the defendant. *Wolcott v. Studebaker* (C. C.) 34 Fed. 8, 13; *Drummond v. Louisville & Nashville R. Co.* (C. C.) 109 Fed. 531; *Meyer v. National Biscuit Co.* (7th Circuit) 168 Fed. 906, 94 C. C. A. 335. In *Gassman v. Jarvis* (C. C.) 94 Fed. 603, a similar holding was made under a statute of Indiana, permitting the plaintiff to dismiss "before the jury retires." In *Chicago, M. & St. P. R. Co. v. Metalstaff* (8th circuit) 101 Fed. 769, 41 C. C. A. 669, it was held in an opinion by Judge Thayer that the federal courts sitting in Missouri were bound by the statute of that state which, as construed by the state courts, permitted the plaintiff to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury. The same rule was applied by Judge McPherson with respect to a statute of Iowa, permitting a dismissal by the plaintiff "before the final submission of the case to the jury." *Duffy v. Glucose Sugar Refining Co.* (C. C.) 141 Fed. 206. The decisions in the fourth circuit, with respect to the North Carolina practise, are possibly distinguishable from those in the seventh and eighth cir-

cuits, under the statutes of Illinois, Indiana, Iowa and Missouri, in that the North Carolina practise is not based upon statute, but apparently upon construction of common law rules. *Pescud v. Hawkins*, 71 N. C. 299. There is authority for the proposition that a federal court was not required by section 914 of the Revised Statutes of the United States to follow a state practise which is not statutory, but was established by a decision of the state supreme court as the proper mode of procedure under the common law. *Wall v. Chesapeake & Ohio R. Co.* (7th circuit) 95 Fed. 398, 37 C. C. A. 129; *Sanford v. Town of Portsmouth*, Fed. Cas. No. 12,315, decided in the eastern district of Michigan by Judge (later Mr. Justice) Brown.

"The question is not free from difficulty. We are impressed, however, with the view that the Kentucky statute does not relate merely to the personal conduct and administration of the judge in the discharge of his separate functions, but confers a substantial right and prescribes a practise and mode of proceeding which under the federal statute is binding upon the courts of the United States sitting within that state."

In the case of *Chicago, M. & St. P. R. Co. v. Metalstaff et als.*, supra, an action for personal injuries, after the conclusion of plaintiff's testimony, the defendant asked the court for an instruction directing a verdict for the defendant. The trial court announced its intention to give the instruction. Whereupon, before the jury had retired from the court room or returned their verdict, the plaintiff, through his counsel, asked leave to take a nonsuit. The trial court granted such leave, holding that it had no power to refuse the request. Thereupon, the jury was discharged from their consideration of the case, and a judgment was entered that the defendant go hence and recover of the plaintiff its costs. The defendant excepted to the allowance of a nonsuit after the court had granted its instruction, and insisted on writ of error that the trial court should have required the jury to return a verdict, and denied plaintiff leave to take a nonsuit. The United

States circuit court of appeals for the western district of Missouri held: "Under Rev. Stat. U. S., Art. 914, providing that the practise in the United States courts shall conform as near as may be to the practise of the courts of the state in which the United States court is sitting; and Rev. Stat. Mo. 189, Art. 639, providing that plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to jury or to the court; it was not error for the United States court sitting in Missouri to grant plaintiff's motion for a nonsuit, made subsequent to the announcement of the court of its intention to direct a verdict in favor of the defendant, but before the jury had retired from the court room or returned a verdict." The court said:

"It matters not that leave to take a nonsuit is not sought until after the law of the case has been fully declared by the court, since the plaintiff has the right to take a nonsuit at any time before the jury has actually retired——. It is claimed, however, in behalf of the defendant company—and this is the only question presented by the record that can be said to admit of any controversy—that the rule of practise which obtains in the courts of the state is not obligatory upon the federal courts, but may be rejected by them. Concerning this contention, it may be said that while section 914 of the Revised Statutes of the United States, as heretofore construed (*Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Railroad Company v. Horst*, 93 U. S. 291, 299, 23 L. Ed. 898) does not require that the modes of procedure in the courts of the United States in law cases shall conform in all respects to the practise which obtains in the courts of the state where the court is held; yet the statute does enjoin that the practise shall be the same 'as near as may be.' This implies, of course, that the federal courts can not arbitrarily reject established rules of procedure which are observed in the courts of the state in accordance with local laws, but must be governed thereby, except in those cases where the rule is in conflict with some federal law or rule of procedure or where the observance of such rules by the federal courts would occasion great incon-

venience or interfere with the due administration of the law. We perceive no sufficient reason why the federal court sitting in Missouri should decline to be bound by the rule of procedure now in question, which is so well established in the courts of the state, and has been in force for so many years, that it would doubtless have been abrogated long since, if it had led to any considerable inconvenience or to the increase of litigation, or had tended in any way to defeat the ends of justice. It is desirable for many reasons that those rules of practice which govern the local courts, and with which the bars are familiar, should likewise receive recognition by the federal courts, and control the conduct of litigation therein, when no evil results are liable to ensue. We accordingly conclude that the trial judge properly allowed the plaintiff to take a nonsuit under the circumstances heretofore indicated."

In *Gassman v. Jarvis*, *supra*, another personal injury case, at the close of the plaintiff's testimony, the defendant's counsel gave notice that he desired the court to give the jury a binding instruction to find for the defendant, and stated that he desired to be heard on that question. Thereupon, the court asked the jury to leave the court room, and the question whether or not such an instruction should be given was argued. At the close of the argument, the court reviewed the testimony in the case, and at its conclusion announced that it would direct the jury to find a verdict for the defendant. The court then directed the bailiff to bring the jury into the court room, and have them take their seats in the jury box, for the purpose of giving them an instruction to find for the defendant. While the jury were returning to their seats, and before they had all done so, the plaintiff, by counsel, notified the court that he would dismiss the case and asked leave to do so. Counsel for the defendant objected to such dismissal, and insisted on the right to a verdict. The court refused to permit a dismissal of the case, to which plaintiff, by counsel, excepted, and the jury were then instructed to find for the defendant, which they did. The plaintiff later moved the

court to set aside the verdict and to dismiss the case pursuant to his motion. The court said:

"The statute of this state rules the question. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 40, 11 Sup. Ct. 478. The statute reads: 'An action may be dismissed without prejudice, first, by the plaintiff before the jury retires; or, when the trial is by the court, at any time before the finding of the court is announced.' 1 Burns' Rev. Stat. 1894, Art. 336. A careful examination of the authorities has convinced me that the announcement by the court of its intention to give a binding instruction to the jury to find for the defendant was not such a submission of the case as to bar the plaintiff's right to dismiss before the jury had retired. Even after such an instruction had been given to the jury, it would not be too late to dismiss. The actual withdrawal of the jury from their seats to consider of their verdict would not be necessary to constitute a retirement within the meaning of the statute. After the court has given the case in charge to the jury for their consideration, even though they remain in their box, this would constitute a retirement, within the meaning of the statute, and would toll the plaintiff's right to dismiss. Here the jury had not been instructed, and the only thing which the court had done was to announce to the parties and to their counsel what instruction the court would give. The motion to dismiss, having been made before the jury had been instructed, and before their retirement, was seasonably made, and it ought to have been sustained."

The Virginia statute, quoted above, has been construed by the supreme court of appeals of Virginia in the case of *Harrison et al. v. Clemens, Road Commissioner, et al.*, 71 S. E., 538, 112 Va. 371, to mean that the plaintiff may take a nonsuit at any time before the case is submitted to the jury and they have retired from the court room. The court said: "To enter a nonsuit has been recognized as a matter of right under the law and practise of Virginia from a very early date down to the present time. The statute (section 3387) recognizes this right, and only fixes the stage at which a plaintiff is precluded

from taking a nonsuit, towit, when the case has been submitted to the jury and they have retired from the court room. Our statute specifies only the time when a nonsuit may not be suffered, towit, after the jury retire from the bar; and it follows necessarily that a nonsuit is to be allowed at any time before the jury retire, or, as in this case, before the case is submitted to the court hearing it as a common law case."

The common law rule was that a plaintiff might discontinue an action or submit to a nonsuit at any time before verdict. The Virginia statute modified the common law rule only to the extent of taking away the right to a nonsuit after the jury has retired from the bar. It can not properly be construed to mean that the right to suffer a nonsuit shall be denied a plaintiff before his case has been submitted to the jury, before they have received the instructions of the court, while they are yet in the jury box, and while the judge and counsel are in the judge's room, even though the judge has announced to the attorneys that he will direct a verdict for the defendant.

The rule that the construction of a state statute by the court of last resort of the state must be followed by the federal court sitting within that state was applied in no uncertain terms by the United States circuit court of appeals for the sixth circuit in *Worthington v. McGough*, *supra*. The court said:

"We recently quite fully considered the situation which arises when the court has announced its intention to direct a verdict against the plaintiff, and when the plaintiff then seeks voluntarily to dismiss. This was in *Knight v. Illinois Central R. R. Co.*, 180 Fed. 368, 103 C. C. A. 514. The statute of Kentucky, there considered, which declared that plaintiff had the right of dismissal at any time prior to final submission to the jury, is identical in language with the Ohio statute here involved (Ohio Gen. Code, Art. 11,586). In that case we held that such a statute was applicable in the federal courts sitting in that state, and that the federal courts must follow the rule of construction adopted by the courts of that state. We are now told that the supreme court of Ohio, in *Turner v. Pope*

Motor Car Co., 79 Ohio State 153, 86 N. E. 651, has construed this statute, and has held that under such circumstances the defendant is entitled to have judgment entered in his favor. If that is the ruling of the Ohio supreme court, the action of the trial court herein was error; but if the decision of the Ohio supreme court does not apply to such a situation as that now under review, then we must follow our own view of the statute's meaning."

While the United States Supreme Court has not expressly decided the question under consideration, it has in two cases indicated that the rulings of the United States circuit courts of appeals, other than that of the fourth circuit, are correct.

In *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 57 L. Ed. 879, it said: "At the trial the defendant requested that a verdict in its favor be directed; and had the court indicated its purpose to do that, it would have been open to the plaintiff, under the then prevailing practise, to take a voluntary nonsuit, which would have enabled her to make a fuller and better presentation of her case, if the facts permitted, at another trial in a new suit."

In *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55, in passing upon the question of a motion to order an involuntary nonsuit, it said: "Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defense that the plaintiff, upon his own case, shows no cause of action, is a question of practise, pleadings and forms and modes of proceeding, as to which the courts of the United States are now required by the Act of Congress of June 1, 1872, chap. 255, art. 5 (17 Stat. 197), re-enacted in art. 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the state within which the trial is had."

The great weight of authority, indeed the concensus of authorities outside of the fourth circuit, leaves no room for doubt that the Conformity Act applies to the practise and mode of proceeding of the several states with respect to mo-

tions either for leave to suffer voluntary nonsuits or to order involuntary nonsuits; and that the federal district courts, in passing upon such motions, must follow the established practise and mode of proceeding of the respective states within which they are held. Upon reason this is the true rule, not only because it seems clearly intended by the terms of the act, but also because it obviates the necessity for the bars of the respective states to be familiar with two different sets of procedure and to discriminate between them, which formerly gave rise to confusion which it was the purpose of congress to clear away when it passed the act requiring conformity in procedure.

The petitioner was therefore within his legal rights when, seeing that the trial court considered the evidence insufficient to charge the respondent with notice of the defective condition of the step, and realizing that upon another trial he could produce additional evidence for that purpose, he moved for leave to suffer a voluntary nonsuit. The mere ordinary inconveniences of double litigation should not be transformed into a barrier to defeat the ends of justice. The trial court should have granted the motion.

For the reasons given above, the circuit court of appeals should not have affirmed the action of the trial court in overruling petitioner's motion for leave to take a voluntary nonsuit.

CONCLUSION

This is a case in which the issuance of a writ of certiorari would be peculiarly appropriate. It not only appears that the circuit court of appeals has erred in the two material respects which we have discussed; but it also appears that a serious conflict exists between the decisions of the circuit court of appeals of the fourth circuit and decisions of the circuit courts of appeals of other circuits upon the question whether or not, under the Conformity Act, a federal district court should conform to the practise and mode of proceeding of the state in which it is sitting, fixed by statute, in respect to motions

for leave to suffer voluntary nonsuits. The question is an important one, and an authoritative decision of this court, clearing away the confusion and stating the true rule, would be eminently proper. We therefore respectfully submit that the writ of certiorari should be granted, and that the judgment of the circuit court of appeals should be reviewed and reversed and the case remanded for a new trial.

Respectfully submitted,

WELBORN and JAMISON,

JOHN G. CHALLICE,

Counsel for Petitioner.

W. L. Welborn,
Of Counsel.

SUBJECT INDEX

	Page
Statement of case.....	1
Argument	4
Conclusion	26

AUTHORITIES

	Page
Aetna Life Ins. Co. v. Township of Lakin, 59 Fed. 989.....	15
Cyc. Vol. 26, page 1146.....	12
Chicago, M. & St. P. R. Co. v. Metalstaff, 101 Fed. 769.....	15, 17, 18
Code Virginia, Section 3387.....	14, 22
Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed. 55.....	21, 24
Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. Ed. 213.....	13
Drummond v. Louisville & Nashville R. Co., 109 Fed. 531.....	15, 17
Duffy v. Glucose Sugar Refining Co., 141 Fed. 206	15, 17
Fed. Rev. Stat., Sec. 914; 4 Fed. Stat. Anno. 563	14
Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 37 L. Ed. 1107.....	11, 12
Goodrich v. N. Y. Cent. & H. R. R. Co., 5 L. R. A. 750	12
Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. Ed. 485.....	12
Gassman v. Jarvis, 94 Fed. 603.....	15, 17, 21
Harrison et al. v. Clemens, Road Commissioner et al., 71 S. E. 538, 112 Va. 371.....	22
Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 53 L. Ed. 984.....	12
Knight v. Illinois Cent. R. Co., 180 Fed. 368	15, 16, 23
Leary v. Houghton County Traction Co., 137 N. W. 225, 45 L. R. A. (N. S.) 359.....	11
Labatt's Master and Servant, Articles 1023 and 1024.....	12

AUTHORITIES—Con.

	Page
Myers v. National Biscuit Co., 168 Fed. 906--	15, 17
Prosser v. Montana Cent. R. Co., 30 L. R. A. 814	12
Republic Elevator Co. v. Lund, 45 L. R. A. (N. S.) 707, 196 Fed. 745-----	11
Richmond & D. R. Co. et als. v. Burnett, 14 S. E. 372, 88 Va. 538-----	12
Richmond & Danville R. Co. v. Powers, 149 U. S. 43, 37 L. Ed. 642-----	13
Rhode v. Duff et al., 208 Fed. 115-----	15
Sioux City & P. R. Co. v. Stout, 17 Wall 657, 21 L. Ed. 745-----	13
Slocum v. New York Life Ins. Co., 228 U. S. 364, 57 L. Ed. 879-----	24
Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. Ed. 1188-----	11
Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. Ed. 1136-----	11
Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. Ed. 829-----	11, 12
Twombly v. Consolidated Electric Light Co., 64 L. R. A. 551-----	12
Union Pacific R. Co. v. Snyder, 152 U. S. 684, 38 L. Ed. 597-----	11
Virginia Code, Section 3387-----	14, 22
Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. Ed. 235-----	13
Wolcott v. Studebaker et al., 34 Fed. 8-----	15, 17
Worthington v. McGough, 192 Fed. 512-----	15, 23
Whitted v. Southwestern Telegraph & Tele- phone Co., 217 Fed. 835-----	15
Young v. Snell, 86 N. E. 282, 19 L. R. A. (N. S.) 242-----	11

In the Supreme Court of the United States

S. D. BARRETT, PETITIONER,

v.

**THE VIRGINIAN RAILWAY COMPANY,
A CORPORATION, RESPONDENT.**

BRIEF OF COUNSEL FOR PETITIONER.

The petitioner commenced an action of trespass on the case, arising under An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases, approved April 22, 1908, against the respondent in the district court of the United States for the western district of Virginia, which action was tried before a jury at the February term, 1917, of said court.

At said trial the petitioner introduced evidence proving or reasonably tending to prove that in July, 1915, he was in the employment of the respondent as a machinist at Elmore, West Virginia, where the respondent has a roundhouse and yard; that on the day he was injured an extra pusher engine was on the "ready track" in the yard, where engines were placed for crews to call for them; that the crew for this engine was ready to go out with it; that before they started the engineer found that the sand

pipes were stopped up with wet sand; that he sent to the shop for a machinist to open the pipes and the petitioner was instructed by the foreman to work on them and clean them out; that when the petitioner got to the engine, he began working on one of the sand pipes, and found difficulty in getting it open; that it became necessary to take pipe off in order to clean it out; that after he had gotten the wet sand out he went up over the front of the engine and over the running board and connected the pipe at the top; that he then started back down the same way to connect it at the bottom, that is, over the running board and by-pass valve and steps to the front of the engine and off on the ground, which is the usual way to come down and the way he should have come; that he had gotten part of the way down, when his right foot slipped off of one of the steps, which was defective and slanting, causing him to fall and his left leg to come down behind and hit across the step; that thereby the large bone in his leg was fractured and he was otherwise injured; that it was in the day time when this occurred; that he looked at the step almost immediately after he had fallen from it; that it was about 6 feet from the ground; that he saw that, instead of being horizontal, it was cracked, broken and slanting, the front being about $1\frac{1}{2}$ inches lower than the back; that it was made of a flat piece of boiler iron, perfectly smooth on top, and was from 10 to 12 inches wide, about 18 inches long and about $\frac{3}{16}$ of an inch thick; that the angle iron, attached beneath the step to support it and to prevent it from springing, had a crack in it and was broken, and would not wholly support the step; that the step was supposed to be perfectly rigid, and this angle iron was the only support provided

for it; that the angle iron was about 1½ inches wide, and was very strong and hard to bend; that about 30 days afterwards the petitioner examined the step more carefully and saw that the angle iron had two cracks in it; that the respondent had no inspectors at Elmore; that the machinists did their own inspecting, and inspected running gears and engines underneath, but that their duty of inspection did not extend to running boards or steps; that the respondent knew or by the exercise of ordinary care could have known of the defective condition of the step; that the roundhouse foreman was near the engine when the petitioner fell; and that he had never made any special examination of the step to see whether it was out of repair or not.

When the evidence was concluded the respondent moved the court to direct a verdict for the defendant; that thereupon the court adjourned until Monday; that on Monday the court, having considered the motion, and being of the opinion that the motion should be granted, read his opinion to counsel and announced that he would direct a verdict for the defendant; that thereupon the petitioner, by counsel, moved the court to be permitted to take a voluntary nonsuit, which motion was opposed by counsel for the respondent; that the court then overruled said motion, and to this ruling the petitioner, by counsel, excepted; that the court thereupon directed the jury to find a verdict for the defendant, and to this action of the court the petitioner, by counsel, excepted; that the jury thereupon found a verdict for the defendant; that the petitioner, by counsel, then moved the court to set aside said verdict and grant him a new trial; that the court overruled this motion, and to this action of the

court the petitioner, by counsel, excepted. The court then gave judgment for the defendant, and the petitioner, by counsel, excepted.

The petitioner duly applied for and obtained a writ of error to have said judgment reviewed by the United States circuit court of appeals, fourth circuit; that the case was argued before said court on May 28, 1917, and submitted; that on July 7, 1917, said court rendered its decision and entered judgment affirming the judgment of the district court; and the case is now before this court for decision upon a writ of certiorari.

ARGUMENT.

There are two questions in controversy:

- (1) Should the circuit court of appeals have affirmed the direction of a verdict for the respondent?
- (2) Should that court have affirmed the refusal to let the petitioner take a voluntary non-suit?

(1)

Under the federal employers' liability act, which governs the case, if the evidence proves or reasonably tends to prove that the respondent was guilty of any negligence causing or contributing to the injury, the case should be submitted to the jury. This rule is not disputed. The question is whether or not the evidence proves or reasonably tends to prove that the respondent was guilty of such negligence.

It is not denied that the step the petitioner fell from was defective at the time he fell, though certain of the respondent's witnesses say they did not observe the

defect. It was broken and slanting. It is also not disputed that the defective condition of the step was the cause of the petitioner's fall and consequent injury. Therefore, if the respondent knew of the defect, or should have known of it in the exercise of ordinary care, it was guilty of negligence causing or contributing to the injury.

The step was on the front part of the engine, about 6 feet from the ground. It was made of a flat piece of boiler iron, perfectly smooth on top, and was from 10 to 12 inches wide, about 18 inches long and about $\frac{3}{16}$ of an inch thick. It was supposed to be rigid. An angle iron about $1\frac{1}{2}$ inches wide, running beneath the outer edge of the step, was the only support provided to keep it from springing. On the day the petitioner fell this angle iron had a crack in it and was broken, and would not wholly support the step; and the step was slanting, so that the forward edge was about $1\frac{1}{2}$ or 2 inches lower than the back. It was the custom for employes to use this step in going on the engine and off again to the ground.

The engine had been placed on the "ready track," where the crews call for their engines, and the crew had taken charge of it, when the petitioner, who was a machinist, was summoned from the roundhouse to clean out a sand pipe on the side of the engine which was clogged up. He had cleaned it out and connected it back at the top, and was coming down to connect it at the bottom when he slipped from the defective step and was injured. The roundhouse foreman was right near the engine while the petitioner was doing this work, and had just started back toward the shop when he fell. He had never made any special examination of the step to see whether it was out

of repair or not. After the petitioner had fallen, he looked up from where he sat on the ground some feet away to ascertain why he had fallen, and saw the defective condition of the step.

The evidence therefore proves that the step was defective when the petitioner fell, and that its defective condition was visible on inspection. The roundhouse foreman had charge of the work and exercised supervision over it, and had reasonable opportunity to observe the defective condition of the step and to take precaution against injury arising from it. If he was negligent in not seeing it, his negligence is imputed to the respondent. It can not be said as a matter of law that he was not negligent. It was a jury question.

Further, the defect was necessarily preexisting in its nature. A step made of iron, and constructed so it is normally rigid, does not become broken, slanting, cracked, and in a springing condition, except through long continued use or by being subject to a heavy blow, such as may be caused by the falling of a heavy object or by the impact of a collision. Proof of the defective condition of the step and proof that the engine had been stationed on the "ready track" for service combine to prove that such defective condition necessarily commenced at some time in the past. Before sending the engine out for service, the roundhouse foreman or some other representative of the master should, in the exercise of ordinary care, have discovered the condition of the step and had it remedied. It is an important matter for railroad engines to be in proper condition when in service, as a safeguard to life and limb. They should be carefully inspected before they are sent out, so as to be free from defects. The

trial court in its opinion expressed the view that if the step had been damaged in a collision, it might have occurred so shortly before the petitioner's injury that the respondent would not be liable for the condition of the step. Such a holding is clearly erroneous. If the step was damaged in a collision, the respondent knew it or ought to have known it, and in either case was guilty of negligence in sending it out for service. This was a jury question.

Furthermore, the evidence proves that the inspection system of the respondent at Elmore was absolutely inadequate. It had no inspectors there whatever. This fact is uncontradicted. As a result, the machinists did their own inspecting. But their duty of inspection did not extend to running boards or steps. It is evident from the testimony that the inspecting done by the machinists was to see that the mechanical part of the engine was in operating condition, and not to see that the engine was in a safe condition as a place of work. It appears, therefore, that the running boards and steps were not included in the inspection system, and were not regularly inspected. Proof of the preexisting nature of the defect in the step makes this evidence significant. It proves negligence in failing to discover the defect.

The circuit court of appeals took the position that the respondent was not shown to have had notice of the defect, and that it was therefore not liable. It was wrong. Whether it had actual notice or not we do not know, but it is certainly charged with constructive notice. A master can not provide an inadequate inspection system, not embracing steps and running boards of engines, and escape liability for injuries to a servant resulting from a

defect in a step which is necessarily preexisting on the ground that it had no notice of the defect. Otherwise there would be a loophole in the safe place rule which would encourage negligent management and lead to disastrous results. Furthermore, it is not incumbent on a plaintiff, in order to establish the fact of constructive notice, to prove just how the defective condition arose and over what length of time it extended. It is sufficient to prove that the defect was such as to be necessarily preexisting in nature and that the respondent should have discovered it in the exercise of ordinary care. The petitioner did that in this case, and he was entitled to have the question submitted to the jury. The evidence that certain employes of the respondent had no notice of the defect, so much relied upon by the circuit court of appeals, is purely negative in character and does not in the least prove the nonexistence of the defect. They may have known it and failed to inform the petitioner. On the contrary, it adds weight to the petitioner's proof that the respondent did not use ordinary care to discover its existence.

The circuit court of appeals accepts as true the testimony of one of the respondent's witnesses that the petitioner made three trips up and down the defective step, and holds that if the defective condition of the step was obvious he assumed the risk of injury. In doing so, it ignores the petitioner's positive testimony to the effect that on the first two trips up and down he used a different route, that it was on the third trip that he first used the step, and that he had therefore been over it only once before he fell. Attention is further called to the fact that, while the condition of the step was sufficiently obvious to be discovered on ordinary inspection, the peti-

tioner had no time to stop and examine or inspect the steps and running board of the engine. The crew was waiting and the sand pipe had to be fixed and he was fixing it. His attention was on his work, not on the condition of the steps and running board, which he naturally considered safe. The evidence being conflicting as to how often he had passed over the step, and showing that he had little or no opportunity to observe its condition, it is clearly wrong to say as a matter of law that he assumed the risk of injury resulting from it. The most that can be said is that it was a question for the jury to pass on in the light of all the circumstances.

The fact that the engine had been placed on the "ready track" for service and that the crew had been called and had taken charge of it was in itself tantamount to a declaration that the engine and all its accessories had been inspected and found in proper condition for use. If the step was defective at this time, the respondent is liable, because those whose duties required them to inspect the engine and remedy such defects either failed to inspect it, or if they inspected it failed to discover the defects, or if they discovered it failed to have it repaired. It was in their charge, and when they transferred it to the "ready track" they in effect pronounced it ready for use. From such circumstances the jury could have drawn the reasonable inference that the respondent transferred the engine to the "ready track" and turned it over to the crew in a defective condition, without using ordinary and reasonable care to inspect it and put it in proper condition. The further circumstance that the defective condition of the step was necessarily preexisting in its nature is a basis

for the same inference. These circumstances prove that the defective condition had existed long enough for the respondent to have had full opportunity to discover and remedy it, and upon them the jury could have based a finding that it was negligent in furnishing the engine for service in an unsafe and defective condition. The assertion of the trial court, affirmed by the court of appeals, that the injury to the step might have occurred immediately prior to the petitioner's fall, and that the respondent is therefore not chargeable with notice of it, is simply begging the question. It is not only contrary to the evidence, but is contrary to reason and common knowledge. If the condition of the step was such as is caused by the impact of a collision or by the falling of some heavy object, and if such a disaster occurred immediately prior to the time when the petitioner sustained his injuries, as suggested in the trial court's opinion, the engine would have been rendered for a time utterly unfit for service and would have been left in the roundhouse for overhauling and repairs, instead of being placed on the ready track for service, because it would have been impossible for such a happening to have occurred without other parts of the engine being damaged, in addition to the step. The position of the step on the engine alone demonstrates that, to say nothing of common knowledge of engines, because it was situated at such a protected place on the engine that if the engine had collided with some other engine or car or train or heavy object with such force as to produce the defective condition shown to have existed in the step, other parts of the engine would first have received the force of the impact or blow, which could not reach and damage the step until the barriers in

the way were disrupted. In the very nature of things such a happening could not have taken place so close upon the time of the petitioner's fall from the step that the respondent did not know of it or did not have full opportunity to ascertain the extent of its consequences. Such occurrences disable engines for days, if not for weeks or months. The respondent must of necessity have known of the defective condition of the step or had every opportunity to discover it. In order to meet the proposition of the trial court that the injury to the step might have arisen a few moments before the petitioner fell from it, we moved for leave to take a voluntary nonsuit, so that evidence could be produced showing that no such disaster occurred to produce the injury immediately prior to the petitioner's fall.

The rule that notice of a defect may be proved by circumstantial evidence is based not only on sound reason, but is fully sustained by the authorities.

Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. Ed. 1188.

Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. Ed. 1136.

Union Pacific R. Co. v. Snyder, 152 U. S. 684, 38 L. Ed. 597.

Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 37 L. Ed. 1107.

Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. Ed. 829.

Republic Elevator Co. v. Lund, 45 L. R. A. (N. S.) 707, 196 Fed. 745.

Leary v. Houghton County Traction Co., 137 N. W. 225, 45 L. R. A. (N. S.) 359.

Young v. Snell, 86 N. E. 282, 19 L. R. A. (N. S.) 242.

Twombley v. Consolidated Electric Light Co., 64 L. R. A. 551.

Prosser v. Montana Central R. Co., 30 L. R. A. 814.

Richmond & D. R. Co. et als. v. Burnett, 14 S. E. 372, 88 Va. 538.

Goodrich v. N. Y. Cent. & H. R. R. Co., 5 L. R. A. 750.

Labatt's Master and Servant, articles 1023 and 1024.

26 Cyc. 1146.

Furthermore, this court has established the rule that the question of negligence is one of law for the court only when the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, that a case should not be withdrawn from the jury, unless the conclusion follows as a matter of law that no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish.

Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 53 L. Ed. 984.

Gardner v. Michigan Central R. Co., 150 U. S. 349, 37 L. Ed. 1107.

Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. Ed. 829.

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. Ed. 485.

The rule has also been stated by this court as follows:
"Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the

testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them."

Richmond & Danville R. Co. v. Powers, 149
U. S. 43, 37 L. Ed. 642.

Delaware, L. & W. R. Co. v. Converse, 139
U. S. 469, 35 L. Ed. 213.

Washington & G. R. Co. v. McDade, 135
U. S. 554, 34 L. Ed. 235.

Sioux City & P. R. Co. v. Stout, 17 Wall
657, 21 L. Ed. 745.

When it is considered, therefore, that the respondent had no inspectors at Elmore and no system of inspection extending to steps and running boards of engines; that the engine was placed on the "ready track" for service with a step in a defective condition that was necessarily pre-existing in its nature; that the defective condition of the step was visible on inspection; and that even after the engine had been placed on the "ready track" the round-house foreman, who had supervision over engines, was present prior to the petitioner's fall and had full opportunity to discover such defective condition; it is clear, in the light of the authorities cited, that the question whether or not the respondent had notice of such defective condition, or should have had notice of it in the exercise of ordinary care, should have been submitted to the jury.

For the reasons given above, the circuit court of appeals should not have affirmed the action of the trial court in directing a verdict for the respondent. By doing so it committed reversible error.

Section 914 of Fed. Rev. Stat., 4 Fed. Stat. Anno. 563, known as the Conformity Act, is as follows:

"The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practise, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which circuit or district courts are held, any rule of court to the contrary notwithstanding."

Section 3387 of the Virginia Code, which was in effect at the time of the trial of this case, is as follows:

"A party shall not be allowed to suffer a nonsuit unless he do so before the jury retire from bar."

Upon the question whether or not a federal district court is required by the Conformity Act to conform to the practice and mode of proceeding in civil causes prevailing in the state within which the district court is held with reference to the right of a plaintiff to suffer a voluntary nonsuit, there is a sharp conflict between the decisions of the circuit court of appeals of the fourth circuit and the decisions of the circuit courts of appeals of other circuits.

In the three cases arising in North Carolina the circuit court of appeals of the fourth circuit refused to conform to the practise and mode of proceeding fixed by the state statute, providing in effect that the plaintiff may

suffer a nonsuit at any time before verdict; but followed what it denominated a more reasonable practise, and held that a motion for leave to suffer nonsuit should be denied, although such motion was made before submission of the case to the jury. In the case at bar the court followed these prior decisions, and refused to follow the established practise and mode of proceeding fixed by the Virginia statute.

In the following cases the circuit and district courts and circuit courts of appeals of other circuits, acting under the provisions of the Conformity Act, have consistently followed the established state practise with reference to the right of a plaintiff to suffer a voluntary nonsuit.

Wolcott v. Studebaker et al., 34 Fed. 8 (Ill.).

Aetna Life Insurance Co. v. Township of

Lakin, 59 Fed. 989 (Kan.).

Gassman v. Jarvis, 94 Fed. 603 (Ind.).

Chicago, M. & St. P. R. Co. v. Metalstaff, 101 Fed. 769 (Mo.).

Drummond v. Louisville & Nashville R. Co., 109 Fed. 531 (Ill.).

Duffy v. Glucose Sugar Refining Co., 141 Fed. 206 (Iowa).

Myers v. National Biscuit Co., 168 Fed. 906 (Ill.).

Knight v. Illinois Central R. Co., 180 Fed. 368 (Ky.).

Worthington v. McGough, 192 Fed. 512 (Ohio).

Rhode v. Duff et al., 208 Fed. 115 (Neb.).

Whitted v. Southwestern Telegraph and Telephone Co., 217 Fed. 835 (Ark.).

The case of *Knight v. Illinois Central R. Co.*, supra, decided in 1910 by the circuit court of appeals for the sixth circuit, sitting in Kentucky, exhaustively deals with the question of the conformity to state practise by the federal courts under the Conformity Act; reviews the cases; and points out with particularity what proceedings the statute applies to and to what proceedings it does not apply. It expressly holds that the statute applies to Civil Code of Procedure of Kentucky, section 371, permitting a plaintiff to dismiss without prejudice before final submission of the case to the jury.

In that case, at the conclusion of the evidence, the defendant moved that the jury be instructed to find for the defendant. The court thereupon excused the jury until the following morning, meanwhile hearing argument upon the motion. At its conclusion he announced to the attorneys that upon the reasons then stated he would sustain the motion, and the jury would be directed to find for the defendant, upon the convening of court the next morning. On the opening of court the next day, before the jury had been instructed, the plaintiff moved to dismiss the case without prejudice. The defendant's objection to such action was sustained and the jury was instructed to find for the defendant, a verdict accordingly being rendered and judgment entered thereon.

The circuit court of appeals reversed the judgment, holding that the state statute was binding on the federal court, quoted the Conformity Act mentioned above, and said:

"Decisions upon the precise question presented here are not numerous, nor are they harmonious. The United States circuit court of appeals of the fourth cir-

cuit has in two cases held that the state practise prevailing in North Carolina, permitting a plaintiff to submit to nonsuit after the conclusion of the evidence and after a motion by the defendant for direction of a verdict had been submitted and sustained, is not binding on the federal courts. *Huntt v. McNamee*, 141 Fed. 293, 72 C. C. A. 441; *Parks v. Southern Railway Co.*, 143 Fed. 276, 74 C. C. A. 414. The courts of appeals of the seventh and eighth circuits have held the contrary. Thus, a statute of Illinois that "every person desirous of suffering a nonsuit on trial shall be barred therefrom unless he do so before the jury retire from the bar" has been held binding upon the federal courts sitting within that state, and to require the permitting of nonsuit even after the announcement of the judge's decision sustaining the motion for a directed verdict for the defendant. *Wolcott v. Studebaker* (C. C.) 34 Fed. 8, 13; *Drummond v. Louisville and Nashville R. Co.* (C. C.) 109 Fed. 531; *Myer v. National Biscuit Co.* (7th Circuit) 168 Fed. 906, 94 C. C. A. 335. In *Gassman v. Jarvis* (C. C.) 94 Fed. 603, a similar holding was made under a statute of Indiana, permitting the plaintiff to dismiss "before the jury retires." In *Chicago, M. & St. P. R. Co. v. Metalstaff* (8th circuit) 101 Fed. 769, 41 C. C. A. 669, it was held in an opinion by Judge Thayer that the federal courts sitting in Missouri were bound by the statute of that state which, as construed by the state courts, permitted the plaintiff to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury. The same rule was applied by Judge McPherson with respect to a statute of Iowa, permitting a dismissal by the plaintiff "before the final submission of the case to the jury." *Duffy v. Glucose Sugar Refining*

Co. (C. C.) 141 Fed. 206. The decisions in the fourth circuit, with respect to the North Carolina practise, are possibly distinguishable from those in the seventh and eighth circuits, under the statutes of Illinois, Indiana, Iowa and Missouri, in that the North Carolina practise is not based upon statute, but apparently upon construction of common law rules. *Pescud v. Hawkins*, 71 N. C. 299. There is authority for the proposition that a federal court was not required by section 914 of the Revised Statute of the United States to follow a state practise which is not statutory, but was established by a decision of the state supreme court as the proper mode of procedure under the common law. *Wall v. Chesapeake & Ohio R. Co.* (7th circuit) 95 Fed. 398, 37 C. C. A. 129; *Sanford v. Town of Portsmouth*, Fed. Cas. No. 12,315, decided in the eastern district of Michigan by Judge (later Mr. Justice) Brown.

“The question is not free from difficulty. We are impressed, however, with the view that the Kentucky statute does not relate merely to the personal conduct and administration of the judge in the discharge of his separate functions, but confers a substantial right and prescribes a practise and mode of proceeding which under the federal statute is binding upon the courts of the United States sitting within that state.”

In the case of *Chicago, M. & St. P. R. Co. v. Metalstaff et als.*, supra, an action for personal injuries, after the conclusion of plaintiff's testimony, the defendant asked the court for an instruction directing a verdict for the defendant. The trial court announced its intention to give the instruction. Whereupon, before the jury had retired from the court room or returned their verdict, the

plaintiff, through his counsel, asked leave to take a nonsuit. The trial court granted such leave, holding that it had no power to refuse the request. Thereupon, the jury was discharged from their consideration of the case, and a judgment was entered that the defendant go hence and recover of the plaintiff its costs. The defendant excepted to the allowance of a nonsuit after the court had granted its instruction, and insisted on writ of error that the trial court should have required the jury to return a verdict, and denied plaintiff leave to take a nonsuit. The United States circuit court of appeals for the western district of Missouri held: "Under Rev. Stat., U. S., Art. 914, providing that the practise in the United States courts shall conform as near as may be to the practise of the courts of the state in which the United States court is sitting; and Rev. Stat. Mo. 189, Art. 639, providing that plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to jury or to the court; it was not error for the United States court sitting in Missouri to grant plaintiff's motion for a nonsuit, made subsequent to the announcement of the court of its intention to direct a verdict in favor of the defendant, but before the jury had retired from the court room or returned a verdict." The court said:

"It matters not that leave to take a nonsuit is not sought until after the law of the case has been fully declared by the court, since the plaintiff has the right to take a nonsuit at any time before the jury has actually retired——. It is claimed, however, in behalf of the defendant company—and this is the only question presented by the record that can be said to admit of any controversy—that the rule of practise which obtains in the

courts of the state is not obligatory upon the federal courts, but may be rejected by them. Concerning this contention, it may be said that while section 914 of the Revised Statutes of the United States, as heretofore construed (*Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Railroad Company v. Horst*, 93 U. S. 291, 299, 23 L. Ed. 898) does not require that the modes of procedure in the courts of the United States in law cases shall conform in all respects to the practise which obtains in the courts of the state where the court is held; yet the statute does enjoin that the practise shall be the same 'as near as may be.' This implies, of course, that the federal courts can not arbitrarily reject established rules of procedure which are observed in the courts of the state in accordance with local laws, but must be governed thereby, except in those cases where the rule is in conflict with some federal law or rule of procedure or where the observance of such rules by the federal courts would occasion great inconvenience or interfere with the due administration of the law. We perceive no sufficient reason why the federal court sitting in Missouri should decline to be bound by the rule of procedure now in question, which is so well established in the courts of the state, and has been in force for so many years, that it would doubtless have been abrogated long since, if it had led to any considerable inconvenience or to the increase of litigation, or had tended in any way to defeat the ends of justice. It is desirable for many reasons that those rules of practice which govern the local courts, and with which the bars are familiar, should likewise receive recognition by the federal courts, and control the conduct of litigation therein, when no evil results are liable to ensue. We accordingly conclude

that the trial judge properly allowed the plaintiff to take a nonsuit under the circumstances heretofore indicated."

In *Gassman v. Jarvis*, *supra*, another personal injury case, at the close of the plaintiff's testimony, the defendant's counsel gave notice that he desired the court to give the jury a binding instruction to find for the defendant, and stated that he desired to be heard on that question. Thereupon, the court asked the jury to leave the court room, and the question whether or not such an instruction should be given was argued. At the close of the argument, the court reviewed the testimony in the case, and at its conclusion announced that it would direct the jury to find a verdict for the defendant. The court then directed the bailiff to bring the jury into the court room, and have them take their seats in the jury box, for the purpose of giving them an instruction to find for the defendant. While the jury were returning to their seats, and before they had all done so, the plaintiff, by counsel, notified the court that he would dismiss the case and asked leave to do so. Counsel for the defendant objected to such dismissal, and insisted on the right to a verdict. The court refused to permit a dismissal of the case, to which plaintiff, by counsel, excepted, and the jury were then instructed to find for the defendant, which they did. The plaintiff later moved the court to set aside the verdict and to dismiss the case pursuant to his motion. The court said:

"The statute of this state rules the question. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 40, 11 Sup. Ct. 478. The statute reads: 'An action may be dismissed without prejudice, first, by the plaintiff before the jury retires; or, when the trial is by

the court, at any time before the finding of the court is announced.' 1 Burn's Rev. Stat. 1894, Art. 336. A careful examination of the authorities has convinced me that the announcement by the court of its intention to give a binding instruction to the jury to find for the defendant was not such a submission of the case as to bar the plaintiff's right to dismiss before the jury had retired. Even after such an instruction had been given to the jury, it would not be too late to dismiss. The actual withdrawal of the jury from their seats to consider of their verdict would not be necessary to constitute a retirement within the meaning of the statute. After the court has given the case in charge to the jury for their consideration, even though they remain in their box, this would constitute a retirement, within the meaning of the statute, and would toll the plaintiff's right to dismiss. Here the jury had not been instructed, and the only thing which the court had done was to announce to the parties and to their counsel what instruction the court would give. The motion to dismiss, having been made before the jury had been instructed, and before their retirement, was seasonably made, and it ought to have been sustained."

The Virginia statute, quoted above, has been construed by the supreme court of appeals of Virginia in the case of *Harrison et al. v. Clemens, Road Commissioner, et al.*, 71 S. E., 538, 112 Va. 371, to mean that the plaintiff may take a nonsuit at any time before the case is submitted to the jury and they have retired from the court room. The court said: "To enter a nonsuit has been recognized as a matter of right under the law and practise of Virginia from a very early date down to the present time. The statute (section 3387) recognizes this right,

and only fixes the stage at which a plaintiff is precluded from taking a nonsuit, towit, when the case has been submitted to the jury and they have retired from the court room. Our statute specifies only the time when a nonsuit may not be suffered, towit, after the jury retire from the bar; and it follows necessarily that a nonsuit is to be allowed at any time before the jury retire, or, as in this case, before the case is submitted to the court hearing it as a common law case."

The common law rule was that a plaintiff might discontinue an action or submit to a nonsuit at any time before verdict. The Virginia statute modified the common law rule only to the extent of taking away the right to a nonsuit after the jury has retired from the bar. It can not properly be construed to mean that the right to suffer a nonsuit shall be denied a plaintiff before his case has been submitted to the jury, before they have received the instructions of the court, while they are yet in the jury box, and while the judge and counsel are in the judge's room, even though the judge has announced to the attorneys that he will direct a verdict for the defendant.

The rule that the construction of a state statute by the court of last resort of the state must be followed by the federal court sitting within that state was applied in no uncertain terms by the United States circuit court of appeals for the sixth circuit in *Worthington v. McGough*, *supra*. The court said:

"We recently quite fully considered the situation which arises when the court has announced its intention to direct a verdict against the plaintiff, and when the plaintiff then seeks voluntarily to dismiss. This was in *Knight v. Illinois Central R. R. Co.*, 180 Fed. 368, 103

C. C. A. 514. The statute of Kentucky, there considered, which declared that plaintiff had the right of dismissal at any time prior to final submission to the jury, is identical in language with the Ohio statute here involved (Ohio Gen. Code, Art. 11,586). In that case we held that such a statute was applicable in the federal courts sitting in that state, and that the federal courts must follow the rule of construction adopted by the courts of that state. We are now told that the supreme court of Ohio, in *Turner v. Pope Motor Car Co.*, 79 Ohio State 153, 86 N. E. 651, has construed this statute, and has held that under such circumstances the defendant is entitled to have judgment entered in his favor. If that is the ruling of the Ohio supreme court, the action of the trial court herein was error; but if the decision of the Ohio supreme court does not apply to such a situation as that now under review, then we must follow our own view of the statute's meaning."

While the United States Supreme Court has not expressly decided the question under consideration, it has in two cases indicated that the rulings of the United States circuit court of appeals, other than that of the fourth circuit, are correct.

In *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 57 L. Ed. 879, it said: "At the trial the defendant requested that a verdict in its favor be directed, and had the court indicated its purpose to do that, it would have been open to the plaintiff, under the then prevailing practise, to take a voluntary nonsuit, which would have enabled her to make a fuller and better presentation of her case, if the facts permitted, at another trial in a new suit."

In *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55, in passing upon the question of a motion to order an involuntary nonsuit, it said: "Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defense that the plaintiff, upon his own case, shows no cause of action, is a question of practise, pleadings and forms and modes of proceeding, as to which the courts of the United States are now required by the Act of Congress of June 1, 1872, chap. 255, art. 5, (17 Stat. 197), re-enacted in art. 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the state within which the trial is had."

The great weight of authority, indeed the concensus of authorities outside of the fourth circuit, leaves no room for doubt that the Conformity Act applies to the practise and mode of proceeding of the several states with respect to motions either for leave to suffer voluntary nonsuit or to order involuntary nonsuits; and that the federal district courts, in passing upon such motions, must follow the established practise and mode of proceeding of the respective states within which they are held. Upon reason this is the true rule, not only because it seems clearly intended by the terms of the act, but also because it obviates the necessity for the bars of the respective states to be familiar with two different sets of procedure and to discriminate between them, which formerly gave rise to confusion which it was the purpose of congress to clear away when it passed the act requiring conformity in procedure.

The petitioner was therefore within his legal rights when, seeing that the trial court considered the evidence

insufficient to charge the respondent with notice of the defective condition of the step, and realizing that upon another trial he could produce additional evidence for that purpose, he moved for leave to suffer a voluntary nonsuit. The mere ordinary inconveniences of double litigation should not be transformed into a barrier to defeat the ends of justice. The trial court should have granted the motion.

For the reasons given above, the circuit court of appeals should not have affirmed the action of the trial court in overruling petitioner's motion for leave to take a voluntary nonsuit.

CONCLUSION

We respectfully submit that this court should reverse the ruling of the circuit court of appeals, which affirmed the action of the trial court in directing a verdict for the respondent; and also reverse the ruling of the circuit court of appeals, which affirmed the action of the trial court in overruling petitioner's motion for leave to take a voluntary nonsuit; and that the case should be remanded to the district court for a new trial.

Respectfully submitted,

W. L. WELBORN,
JOHN G. CHALLICE,
JOHN C. JAMISON,
Counsel for Petitioner.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1918

No. 275.

S. D. BARRETT, *Petitioner*,

vs.

THE VIRGINIAN RAILWAY COMPANY, *Respondent*.

BRIEF OF COUNSEL FOR RESPONDENT.

STATEMENT.

In order to properly present the respondent's contentions the facts of the case may be briefly stated as follows:

The petitioner, who was plaintiff in the District Court, was employed by respondent, who was the defendant in the District Court, as a machinist at Elmore, West Virginia. The defendant maintains at Elmore a roundhouse at which engines are stored and certain repairs are made. The plaintiff's duties consisted of making such repairs to engines and other rolling stock at Elmore as might be found necessary. The engine No. 600, on which the plaintiff was working at the time he received the injury complained of, was being used and had been used for sometime in pusher service out of Elmore. On the day the defendant received the injury complained of this engine had been placed on what is known as the "ready track" to be used in taking a train out of

Elmore. After the engine had been placed on the ready track it was discovered by the engineer in charge that the sand pipe was stopped up and the plaintiff was sent by the foreman of the roundhouse to clean out this sand pipe. In order to perform this service it was necessary for the plaintiff to climb upon the engine. On the front of this engine there are steps leading from the ground up over the pilot to the running board. In doing the necessary work to clean out the sand pipes the plaintiff made several trips up on the engine and in coming down on the last trip he slipped and fell and received the injury complained of.

After he had fallen and had been removed by other employees to a point several feet in front of the engine he claims that he looked at the engine and found that the step on which he slipped and fell was slanting from one to one and one-half inches forward—that is to say, the front portion of the step was an inch or an inch and one-half lower than the rear portion of the step. At the time the plaintiff claims to have discovered that this step was slanting he said nothing about the condition of the step to the other employees who were then present and no one else observed that the step was slanting or that anything was wrong with it. The plaintiff and two of his witnesses claimed to have examined the step a month or more after the accident and found that it was slanting forward, the front portion of the step being lower than the rear portion.

The step in question was made of a flat piece of boiler iron perfectly smooth on top from ten to twelve inches wide, about eighteen inches long and about three-sixteenths of an inch thick. There were two of these steps attached to the front end of the running boards on either side of the engine.

The undisputed evidence of the defendant's witness, Fleshman, is that the steps on both sides of the engine dipped a little bit, that they were built that way and were that way at the time the engine was received from the Baldwin Locomotive Works; that both of them dipped about the same way and are not perfectly level.

Both the day and night foreman of the roundhouse at Elmore who had charge of keeping in repair this engine testified that they never knew that there was anything wrong with the step. The engineer who had been running the engine and the hostler who had charge of it in the roundhouse also testified that they had no knowledge of any defect in the step. There was no evidence produced by the plaintiff to show how the alleged defect in the step was caused or how long the step had been in that condition. There is absolutely nothing in the Record to justify the statement in petitioner's brief that the defendant knew, or by the exercise of ordinary care could have known, of the alleged defective condition of the step.

When all the evidence had been introduced the defendant moved the court to direct the jury to find a verdict for the defendant. This motion was opposed by counsel for the plaintiff and after the motion was fully argued the court took the motion under advisement from Saturday afternoon until Monday morning. When the court convened Monday morning the Judge rendered an opinion in writing, which is made a part of the record, sustaining the defendant's motion to direct a verdict. After the Judge had rendered this decision and had announced that he would forthwith direct a verdict for the defendant the plaintiff moved the court to permit him to take a voluntary non-suit. This motion of the plaintiff was opposed by counsel for the defendant.

It does not appear that this motion for a non-suit was resorted to because the plaintiff was taken by surprise or had failed to introduce any evidence that he could produce, or that any other state of facts existed which would enable the plaintiff to present a different case upon another trial. The statement in respondent's brief that upon another trial he could produce additional evidence is merely an afterthought, because if his motion for a non-suit had been based upon that ground that fact should be disclosed by the Record. In fact, the plaintiff's only reason for moving the court to be per-

mitted to take a non-suit was that the plaintiff's counsel disagreed with the court as to its ruling on the law of the case. This motion of the plaintiff which was not based upon any ground that would justify the plaintiff in taking a non-suit was overruled by the court and the court refused to permit a voluntary non-suit at that stage of the proceedings. Thereupon the court directed the jury to find a verdict for the defendant and upon this verdict the judgment complained of was entered.

ARGUMENT.

It will be observed from the foregoing statement of facts that there are but two questions to be decided upon this appeal, namely:

1. Was error committed by the Trial Court in directing the verdict for the defendant.
2. Was the plaintiff entitled as a matter of right to take a voluntary non-suit after the Trial Court had decided to direct a verdict for the defendant.

I.

The first question above stated involves the ruling of the court on the motion to direct a verdict, and depends upon whether or not the defendant was guilty of negligence in its failure to discover and repair the alleged defect in the step. The District Court in its opinion held that the plaintiff had not introduced any evidence to show that the defendant either knew of the alleged defect, or, in the exercise of ordinary care, should have known of it in time to have prevented the injury to the plaintiff. The District Court further held that to submit the case to the jury would seem to be simply an invitation for them to speculate as to whether or not the alleged defective condition of the step existed for a sufficient length of time before the injury to the plaintiff to have enabled the defendant to have known of its condition. (Record, Page 7.)

The Circuit Court of Appeals held that there are no facts or circumstances from which the jury could have inferred that the defendant had either actual or constructive notice of the alleged defective condition of the step. (Record, Page 46; 244 Fed., Page 397.)

This case is controlled by the ordinary common-law principles of negligence. It is not controlled by any statutory enactment, because this accident occurred on July 27th, 1915, and the amendment to the Federal Boiler Act, making it "apply to and include the entire locomotive and tender, and all parts and appurtenances thereof" did not go into effect until six months after its passage on March 4th, 1915, or until September 4th, 1915. (38 Stat. L. 1192.)

The rule of law is that while it is the duty of the master to exercise ordinary care in providing for the use of servants reasonably safe, sound and suitable machinery and appliances, and to use ordinary care to discover and repair defects, the master does not insure or guarantee that the machinery or appliances are in a safe condition, and where defects exist the master is not held to be guilty of negligence unless he knew or in the exercise of ordinary care should have known, that the machinery or appliances had become defective and were in an unsafe condition. In order to entitle the plaintiff to recover, it must appear that the master had actual or constructive notice of the defect alleged to have caused the injury, and the injured employee must either prove actual notice of the alleged defect or must prove circumstances sufficient to charge the master with knowledge of the alleged defect.

Sherman & Redfield on Negligence, 6th Ed., Sections 193 and 195, Pages 473-482.

Washington, Etc. Railway Co., vs. McDade, 135 U. S. 554.

N. & W. Ry. Co. vs. Reed, 167 Fed. 16.

Virginia, Etc., Wheel Co. vs. Chalkley, 98 Va. 62.

The facts necessary to establish the plaintiff's right to recover must be proved, and cannot be presumed. The

principle applicable is that the burden of showing knowledge or means of knowledge rests upon the plaintiff, and the defendant is not held to be guilty of negligence unless such knowledge or means of knowledge is shown. Under this principle, employers do not insure the absolute safety of machinery or appliances, and they are only held liable when an injury happens because of a defect which was known or in the exercise of ordinary care should have been known.

Patton vs. T. & P. R. Co., 179 U. S. 658.

There is absolutely no evidence in this case of the existence of the alleged defect in the step until the plaintiff claims to have observed it after he fell and received the injury complained of. No witness testified to having previously observed this defect in the step. There was no proof of any accident, collision or other event which might have caused the defect.

The argument of the plaintiff's counsel in the brief filed herein is based on the assumption that the pre-existing nature of the defect was such that in the exercise of ordinary care it should have been discovered. This assumption is in effect that knowledge of a defect will be presumed, contrary to the principle above stated that knowledge or means of knowledge must be proved and cannot be presumed.

In support of this argument that knowledge of the existence of the alleged defect should be presumed, the contention in the brief is that the defendant was guilty of negligence in not providing a sufficient and adequate system of inspection at the roundhouse at Elmore where the accident occurred. It is a sufficient reply to this contention to say that there is no charge in the declaration that the defendant was negligent in failing to provide a sufficient system of inspection at Elmore. If such a charge had been contained in the declaration, the defendant would have been put on notice, and could have produced evidence to show what system of inspection was followed in respect to the particular engine on which this accident occurred.

The whole argument that the defendant had knowledge or means of knowledge of the defective condition of the step is predicated upon the theory that the slanting and defective condition of the step was in plain view and apparent even to casual observation. In this connection the Circuit Court of Appeals in its opinion says: "If the defect was so obvious and easily discovered the plaintiff would undoubtedly have observed it, but as we have stated he testified positively that he never discovered that anything was wrong with the step until after he had fallen to the ground and then observed it." The testimony of the plaintiff shows that he had used this step in going up on the engine just before he was injured. If the defective condition of the step was so apparent and in such plain view that it could have been seen at a glance then whether or not the plaintiff had passed over the step once as stated by him or five times as stated by the witness, McIntosh (Record, Page 26), he knew or should have known of the defective condition of the step and he assumed the risk of any danger incident to using it in that condition.

Seaboard Air Line R. Co. vs. Horton, 233 U. S. 492.

This case does not involve the construction of any Federal Statute, but simply the application of the general principles of the law of negligence to the facts as presented by the Record. There is no dispute or controversy as to the principles of law applicable to the case, and the case only involves a determination of the facts established by the evidence and the inferences deducible therefrom. The courts below, both Trial and Appellate, have decided against the contentions of the plaintiff as to the facts established by the evidence and the inferences deducible therefrom. This court, under the well established rule, will not disturb these conclusions unless they are palpably erroneous and will not scrutinize the whole Record and make a minute analysis of the evidence with a view of drawing therefrom inferences which may possibly conflict with the conclusions of the courts below.

Chicago Junction Railroad Co., vs. King, 222 U. S. 222.

Baugham vs. N. Y. P. & N. R. R. Co., 241 U. S. 237.

Great Northern Railway Co., vs. Knapp, 240 U. S. 464-466.

We, therefore, maintain that no reversible error was committed by the Trial Court in directing the verdict for the defendant.

II.

The second question above stated involves the ruling of the court on the right of the plaintiff to take a voluntary non-suit after the Trial Court had decided to direct a verdict for the defendant. The plaintiff relied on the proposition that he was entitled, as a matter of right, to take a voluntary non-suit at this stage of the proceeding. The Circuit Court of Appeals was of opinion that inasmuch as "the plaintiff was not taken by surprise and that he was not deprived of introducing any newly discovered evidence before the case was submitted to the court for its final determination," the right of the plaintiff to take a voluntary non-suit was not absolute.

The plaintiff relies upon the Federal Statute known as the Conformity Act, and the State Statute which does not allow a party to suffer a non-suit unless he does so before the jury retires from the bar as giving to a plaintiff an absolute right to suffer a non-suit at any time before the jury retires. In Virginia the right of a plaintiff to take a voluntary non-suit depends upon the principles of the Common Law, and the only effect of Section 3387 of the Virginia Code, quoted in the plaintiff's brief, is to limit this right and to fix the stage at which the plaintiff is precluded from taking a non-suit. Prior to the enactment of this Statute the plaintiff had the right in Virginia to take a voluntary non-suit at any time before the jury returned a verdict. The law in Virginia with reference to the right of a plaintiff to take a voluntary non-suit is that this right continues up to the time that a case is

submitted for decision. If the case is to be decided by a jury the right to take a voluntary non-suit exists until the case is submitted and the jury has retired for the purpose of entering upon the consideration of the case. When the case is to be determined by the court this right continues until the case has been finally submitted to the court for its decision. In other words the plaintiff has the right to take a voluntary non-suit until a case is finally submitted for decision either to the jury or to the court.

Harrison vs. Clemens, 112 Va., 371-373.

The question then to be decided is whether or not the plaintiff, under similar circumstances, would have an absolute right under the practice prevailing in the Virginia State Courts to take a voluntary non-suit. In all jurisdiction where the trial is controlled by Common Law principles and matters of fact are submitted to the determination of a jury, some method is adopted for submitting to the court the question of the sufficiency of the evidence to support a verdict. In Virginia the practice in the State Courts has always been to raise the question of the sufficiency of the evidence to support a verdict by a demurrer to the evidence. The practice of directing verdicts has never been adopted in Virginia, and it has been held that the courts have no power to direct a jury as to the verdict to be returned.

Martin vs. Storer, 2 Call. 514.

In fact there is now a statute in Virginia which provides "That in no action tried before a jury shall the trial judge give to the jury a peremptory instruction directing what verdict the jury shall render."

Virginia Acts 1912, Page 52.

The practice in the Federal Courts in Virginia and elsewhere is to present this question as to the sufficiency of the evidence to support a verdict for the decision of the court

by a motion to direct a verdict. This practice in the Federal Courts is uniform and is not varied according to the practice in the several States.

The well established rule of practice in the Federal Courts is that when the evidence is not sufficient to warrant a recovery it is the duty of the court to instruct the jury accordingly.

Schuchardt vs. Allen, 1 Wall. 359.

This practice of granting an instruction directing a verdict in the Federal Courts has superseded the ancient practice of a demurrer to the evidence and is governed by the same principles.

Parks vs. Ross, 11 How. 362.

Richardson vs. Boston, 19 How., 263.

In reference to the practice of Federal Courts in directing a verdict this court has said. "According to the settled practice in the Courts of the United States it was proper to give the instruction if it were clear that the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court."

Merchants Bank vs. State Bank, 10 Wall. 604-637.

The Virginia Statute prohibiting the State Courts from directing verdicts has not been followed by the Federal Courts and they, notwithstanding the Statute, continue to direct verdicts following the established practice in the Federal Courts. The Federal practice of directing verdicts answers the same purpose as the demurrer to the evidence under the Virginia practice and should be controlled by the same principles. In Virginia where there is a demurrer to

the evidence it is the duty of the other party to join in the demurrer, and he will be compelled to do so except under peculiar circumstances.

Trout vs. Virginia & Tennessee Railroad Co., 23 Grat., 619.

After a plaintiff under the Virginia practice has joined in a demurrer to the evidence he will only be permitted to suffer a non-suit in the discretion of the court. The right of the court to exercise this discretion in permitting a plaintiff, after joining in the demurrer, to suffer a non-suit is now embodied in a statute which is as follows:

"In all suits or motions hereafter, when the evidence is concluded before the court and jury, the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be forced to join in the said demurrer until the specific grounds upon which the demurrant relies are stated in writing; nor shall any grounds of demurrer not thus specifically stated be considered, except that the court may, in its discretion, allow the demurrant to withdraw the demurrer; may allow the joinder in demurrer to be withdrawn by the demurree, and new evidence admitted, or a non-suit to be taken until the jury retire from the bar."

Virginia Acts 1912, Page 75.

It is clear that under this statute a plaintiff after having joined in a demurrer to the evidence cannot, as a matter of right, suffer a non-suit and that his right to do so under such circumstances is subject to the discretion of the court. The same principle should apply to the right of a plaintiff to suffer a non-suit in the Federal Courts in Virginia when a motion to direct a verdict has been united in by a plaintiff and has been submitted and decided by the court. The Conformity Statute does not require the practice in the Federal Courts to conform exactly in all respects to that of the State Courts. It only requires that the proceedings shall conform as near as may be to that prevailing in the State

Courts in like cases. The demurrer to the evidence is under the practice in Virginia analogous to the practice of the Federal Courts in directing verdicts. The requirements of the Conformity Act are more nearly complied with in applying the principles applicable to a demurrer to the evidence, to cases in the Federal Courts where motions for directed verdicts are interposed than they would be if the principles applicable to ordinary jury trials were applied in such cases. The effect of a demurrer to the plaintiff's evidence in the Virginia State Courts is to withdraw from the jury and submit to the court for decision the question of the plaintiff's right to recover. When there is a motion in the Federal Courts to direct a verdict for the defendant the effect of this motion is to withdraw from the jury and submit to the court for decision the right of the plaintiff to recover. In either case the jury is effectually eliminated and the whole case is submitted to the court for decision. The principle is well established in Virginia that when a case is submitted to the court for its decision the plaintiff no longer has the right to suffer a non-suit. This was decided in the case of *Harrison vs. Clemens* above cited and relied on in the plaintiff's brief. The case was being tried by the court without a jury and it was held that the right to suffer a non-suit continued until the case was finally submitted to the court for decision. This case is, therefore, authority for the proposition hereinabove stated to the effect that where a case has been finally submitted to the court for decision that the right to suffer a non-suit no longer exists.

The cases relied on in the plaintiff's brief as establishing the rule that a plaintiff may suffer a voluntary non-suit until the case is submitted to the jury for decision notwithstanding the court has decided to direct a verdict for the defendant were decided under statutes of the several states in which these cases arose. In each of these cases the decision was placed on the ground that the absolute right to suffer a non-suit in the State Courts under similar circumstances existed. That the absolute right of a plaintiff to suffer a non-suit in

the State Courts of Virginia under similar circumstances does not exist has already been pointed out; and these cases, therefore, cannot be controlling in determining the right of the plaintiff to suffer a non-suit in the Federal Courts in Virginia.

The more reasonable practice is that adopted by the decisions of the Circuit Court of Appeals of the Fourth Circuit which is that the right of the plaintiff to suffer a non-suit after a motion to direct a verdict has been sustained is within the discretion of the court.

Huntt vs. McNamee, 141 Fed., 293.

Parks vs. Southern Railway Co., 143 Fed., 276.

Cogdill vs. Whiting Mfg. Co., 212 Fed., 658.

In this case it does not appear that any circumstances existed which would have justified the court in the exercise of its discretion to have permitted the plaintiff to suffer a non-suit after the case had been actually decided. The Record does not disclose that the plaintiff was in any way taken by surprise or that he had failed to introduce any evidence that could have been procured. The trial occurred about one and a half years after the accident. The plaintiff's testimony shows that he had evidently made a full investigation of the accident. All of the witnesses who were present when the accident occurred and all of the witnesses appearing to have any knowledge of the particular engine on which the accident occurred were produced and testified at the trial. It does not appear from the Record that the plaintiff even suggested that he could produce additional evidence upon another trial, and so far as this Record discloses the plaintiff's only reason for desiring to suffer a non-suit was that he disagreed with the Judge of the Trial Court as to the legal effect of the evidence submitted.

In view of the fact that the Record fails to disclose any reason why the plaintiff should have been permitted to suffer a non-suit and that he claimed the privilege as a matter of right, it must be assumed that he contemplated bringing

another suit in another forum where perhaps the Trial Judge would agree with him as to the legal effect of the evidence submitted. It has been said that: "It is no part of the business of the State in administering justice to provide for sham trials or to maintain courts for experimental investigation. Indeed, it would be a reproach to our judicial system to permit a defeated litigant to abandon his case and sue again, thus harassing the defendant and wasting money raised by taxation for public purposes."

Bee Building Co., vs. Dalton, 68 Neb., 38.

When the decision of a case has been withdrawn from the jury and submitted to the court either by a demurrer to the evidence or a motion to direct a verdict, the verdict of the jury is a mere formality or a mere ministerial act. The submission of a case to the jury contemplated by statutes providing that a non-suit may be suffered up to the time of the submission of the case to the jury must be construed as having reference to cases actually submitted to the jury for decision and can have no application to cases in which the rendering of the verdict by the jury is a mere formality or ministerial act. The essential thing in such cases is the submission of the case to the court for decision, and to hold that the submission contemplated by the statutes applicable in such cases is the submission to the jury instead of the submission to the court would in effect sacrifice the substance of the proceeding to a mere matter of form.

The rule established by the best reasoned authorities is that a plaintiff's right to suffer a non-suit in a Federal Court after a motion to direct a verdict for the defendant has been sustained by the Court is a matter within the sound discretion of the court, *to be exercised when the plaintiff has been taken by surprise, or his case has not been fully developed, or where other similar circumstances are shown to exist.*

Bee Building Co., vs. Dalton, 68 Neb., 38.

Whitted vs. Southwestern Telegraph & Telephone Co., 217 Fed., 835.

There was, therefore, no error committed in refusing to permit the plaintiff, as a matter of right, to take a voluntary non-suit after the Trial Court had decided to direct a verdict for the defendant.

Respectfully submitted,

W. H. T. LOYALL,
G. A. WINGFIELD,
H. T. HALL.

Counsel for Respondent.

March, 1919.

BARRETT v. VIRGINIAN RAILWAY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FOURTH CIRCUIT.

No. 275. Submitted March 21, 1919.—Decided June 9, 1919.

The right to take a voluntary nonsuit is substantial, and when and how it may be asserted are questions relating directly to practice and mode of proceeding within the intendment of the Conformity Act. P. 476.

Under the law of Virginia, in the absence of a demurrer to the evidence and joinder therein, the plaintiff may take a nonsuit at any time before the retirement of the jury. P. 477.

A motion by defendant for a directed verdict at the conclusion of the testimony, when made in a federal court in Virginia, is not equivalent to a demurrer to the evidence, and the making of such a motion and its impending allowance do not place the plaintiff's right to take a nonsuit at the sound discretion of the court. *Id.*

244 Fed. Rep. 397, reversed.

THE case is stated in the opinion.

Mr. W. L. Welborn for petitioner. *Mr. John C. Jamison* and *Mr. John G. Challice* were on the brief.

Mr. G. A. Wingfield and *Mr. H. T. Hall* for respondent. *Mr. W. H. T. Loyall* was on the brief.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Claiming under the Federal Employers' Liability Act, (April 22, 1908, c. 149, 35 Stat. 65) petitioner sued the Virginian Railway Company in the United States District Court, Western District of Virginia, for damages on account of personal injuries suffered by him July 27, 1915.

At conclusion of the testimony the railway company moved for a directed verdict; after consideration the trial judge read to counsel an opinion giving reasons and announced his purpose to grant the motion. "And thereupon the plaintiff, by counsel, moved the court to be permitted to take a voluntary nonsuit; which motion was opposed by counsel for defendant. And as the court is of opinion that the motion comes too late, it is overruled; and to this action of the court the plaintiff, by counsel, excepted. And thereupon the court directed the jury to find a verdict for the defendant; and to this action of the court the plaintiff, by counsel, excepted. And thereupon the jury rendered and returned the following verdict: 'We, the jury, by direction of the court, find for the defendant.'" Judgment thereon was affirmed by the Circuit Court of Appeals, 244 Fed. Rep. 397. Petitioner there urged that the trial court erred (1) in directing a verdict for the defendant, and (2) in denying the plaintiff's request to take a voluntary nonsuit. Both claims were denied and are renewed here.

473.

Opinion of the Court.

We think refusal to permit the requested nonsuit was error and for that reason the judgment below must be reversed. This makes it unnecessary to consider the other point.

The Act of June 1, 1872,—The Conformity Act—(Rev. Stats., § 914; c. 255, § 5, 17 Stat. 197) provides: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Construing the statute in *Nudd v. Burrows* (1875), 91 U. S. 426, 441, 442, this court said: "The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. It had its origin in the code-enactments of many of the States. While in the Federal tribunals the common-law pleadings, forms, and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes. The remedy was complete. The personal administration by the judge of his duties while sitting upon the bench was not complained of. . . . The personal conduct and administration of the judge in the discharge of his separate functions, is, in our judgment,

neither *practice, pleading, nor a form nor mode of proceeding* within the meaning of those terms as found in the context." See also *Indianapolis & St. Louis R. R. Co. v. Horst*, 93 U. S. 291, 300.

"It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice." *Bowditch v. Boston*, 101 U. S. 16, 18; *Pleasants v. Fant*, 22 Wall. 116, 122; *Oscanyan v. Arms Company*, 103 U. S. 261, 265; *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 482; *District of Columbia v. Moulton*, 182 U. S. 576, 582; *Hepner v. United States*, 213 U. S. 103, 113. And this rule is not subject to modification by state statutes or constitutions. *Indianapolis & St. Louis R. R. Co. v. Horst*, *supra*; *St. Louis, Iron Mountain & Southern Ry. v. Vickers*, 122 U. S. 360, 363; *Lincoln v. Power*, 151 U. S. 436, 442.

At the common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict if not indeed before judgment. *Confiscation Cases*, 7 Wall. 454, 457; *Derick v. Taylor*, 171 Massachusetts, 444, 445; Bac. Abr. Nonsuit (D). And see *Pleasants v. Fant*, *supra*, 122. The right is substantial. When and how it may be asserted we think are questions relating directly to practice and mode of proceeding within intendment of the Conformity Act.

Section 3387, Virginia Code (1904), provides: "A party shall not be allowed to suffer a non-suit, unless he do so before the jury retire from the bar." Prior to this provision, a plaintiff there had the absolute right to take a

473.

Opinion of the Court.

voluntary nonsuit at any time before verdict. *Harrison v. Clemens*, 112 Virginia, 371, 373. Chapter 27, Va. Acts, 1912, directs "That in no action tried before a jury shall the trial judge give to the jury a peremptory instruction directing what verdict the jury shall render." And c. 42, *Idem*, provides: "In all suits or motions hereafter, when the evidence is concluded before the court and jury, the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be forced to join in the said demurrer until the specific grounds upon which the demurrant relies are stated in writing; nor shall any grounds of demurrer not thus specifically stated be considered, except that the court may, in its discretion, allow the demurrant to withdraw the demurrer; may allow the joinder in demurrer to be withdrawn by the demurree, and new evidence admitted, or a non-suit to be taken until the jury retire from the bar."

Citing *Parks v. Ross*, 11 How. 362, 373, and *Richardson v. Boston*, 19 How. 263, (see also *Schuchardt v. Allens*, 1 Wall. 359, 370), petitioner maintains that in the federal courts the practice of directing verdicts has superseded the demurrer to evidence and should be controlled by the same general principles. Therefore, it is said, the statutory rule which gives the judge discretion to allow or refuse a nonsuit after joinder in such a demurrer applies when there is a motion for directed verdict.

Obviously the laws of Virginia recognize a marked distinction between demurrer to evidence and direction of a verdict—the former is permitted, the latter is expressly prohibited. And the different nature and effect of the two things has been pointed out in *Oscanyan v. Arms Company*, *supra*, 264; *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 39; and *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 388. The conclusion announced in *Parks v. Southern Ry. Co.*, 143

Fed. Rep. 276, 277, that because federal courts may in proper cases direct verdicts, therefore, in the exercise of sound discretion they may deny an application for leave to take a nonsuit and direct verdict for defendant is not well founded.

Under the Virginia statute, in the absence of a demurrer to the evidence and joinder therein, the plaintiff may take a nonsuit at any time before submission of the case to the jury and their retirement. The Conformity Statute gives the same right in federal courts. This conclusion accords with opinions by the Circuit Courts of Appeals for the Sixth, Seventh and Eighth Circuits. *Knight v. Illinois Central R. R. Co.*, 180 Fed. Rep. 368; *Meyer v. National Biscuit Co.*, 168 Fed. Rep. 906; *Chicago, M. & St. P. Ry. Co. v. Metalstaff*, 101 Fed. Rep. 769.

The judgment below must be reversed and the cause remanded to the District Court with direction to set aside the judgment in favor of respondent and sustain motion to enter a nonsuit. *Knight v. Illinois Central R. R. Co.*, *supra*, 374; *Harrison v. Clemens*, *supra*, 374, 375.

Reversed.
